IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 48367-0-II
(formerly No. 48697-1-II)

David K. Bowers and Kathryn E. Bowers, husband and wife;
Robert Cobb and Debra A. Cobb, husband and wife; and
Anthony L. Beltrame and Maggie Beltrame, husband and wife,

Respondents,

v.

James W. Dunn, dealing with his separate property
and "Jane Doe" Dunn,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF APPELLANT JAMES W. DUNN

(opening brief after consolidation)

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A. Assignments of Error

1. The trial court erred by finding the private road easement was used by Mr. Jones. CP 115, paragraph 1.1[1].

2. The trial court erred by finding lots 3 and 4 of the 1977 short plat were divided into 4 lots. CP 115, paragraph 1.7.

3. The trial court erred by entering the Order Regarding Parties Rights and Responsibilities in Maintenance of the Road. CP 111-118.

4. The trial court erred by applying the Order Regarding Parties Rights and Responsibilities in Maintenance of the Road to individuals who are not parties to the litigation or benefitted by the easement. CP 111-118.

B. Issues Pertaining to Assignments of Error

1. Was it error for the trial court to find the easement road was used by Mr. Jones when he did not use the road, and to find the 1977 short plat was subdivided to create 4 lots when it created 5? Assignments of Error 1 and 2.

2. Was it error for the trial court to enter an order modifying an express easement, imposing an agreement upon the parties affecting voting rights, road repairs, a speed limit, road sign

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[1] Clerk's Papers were designated in COA No. 48697-1-II prior to the case being consolidated with COA No. 48367-0-II. References to Clerk's Papers throughout this brief are to the Clerk's Papers originally designated under COA No. 48697-1-II.

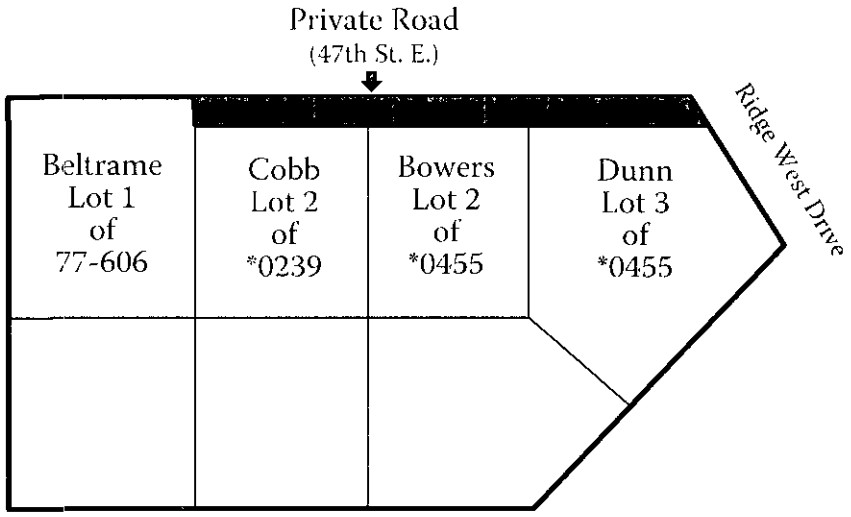
standards, and mandatory dispute resolution through court action only? Assignment of Error 3.

3. Was it error for the trial court to enter an order binding non-parties, and extending the express easement to a non-party who is not benefitted by the easement? Assignment of Error 4.

Statement of the Case

James Dunn owns property at the corner of Ridge West Drive and 47th Street Court East in Lake Tapps, Washington. CP 28, 45, 47, 60. A 1977 short plat created the original lots owned by the parties in this matter (Short Plat 77-606). CP 42, 127. The short plat created four lots and a private roadway (47th Street East, which is to be distinguished from 47th Street Court East) across the north part of what is now Mr. Dunn's property. *Id.* The roadway is gravel. CP 90-93. The lots created by the 1977 short plat were further subdivided in 1984. CP 44, 45, 129, 131. Lot 3 of the original short plat was divided into two lots (Short Plat 8406130239), and Lot 4 was divided into three lots (Short Plat 8406010455). *Id.*

The following diagram illustrates the land owned by the parties and the location of the private road.



The original 1977 short plat map read:

> Said developer and/or adjoining landowners and their successors shall bear the expense of constructing and maintaining all private roads and easements on this plat.

CP 127. The two short plats from 1984 read:

> All lot ownerships shall include their adjoining portions of property for the private road easement as shown on the plat. Said developer and/or adjoining landowners and the successors shall bear the expense of constructing and maintaining all private road and easements on this plat. Before consideration of any proposal to dedicate such roads to Pierce County such roads must meet the standards of Pierce County.

CP 129, 131.

The Bowers, Cobbs, and Beltrames access their property over 47th Street Court East. CP 61, Finding of Fact 1.10. In 2014, the parties litigated whether Mr. Dunn was permitted to place speed bumps in the portion of 47th Street East adjacent to his property to reduce speeding

by the other parties. CP 57-64. The Bowers, Cobbs and Beltrames removed all the speed bumps prior to trial. CP 33, paragraph 3.15. Following trial the court ruled Mr. Dunn could install one speed bump. CP 57-58. The court's order was entered March 19, 2014. *Id.*

A year later, the Cobbs sold their property to Josiah and Jennifer Lewis, and moved from the neighborhood. CP 92, 144; RP (10/16/15) 3.

In May 2015, the Bowers and Beltrames filed a motion asking the court to find Mr. Dunn in contempt of court for repairing the easement road with pea gravel instead of road gravel. CP 66, 69, 83-84, 86-87. The Bowers and Beltrames raised several other complaints in support of their motion. CP 66-88. Mr. Dunn denied the allegations, and stated he placed 7/8 inch crushed rock, not pea gravel, in the roadway. CP 90-93. Mr. Dunn also pointed out the road repairs were completed 9 ½ months earlier, in August 2014. *Id.*

At the hearing in June 2015, the court found Mr. Dunn was not in contempt of court. CP 97-98, 109-110. The court also urged the parties to enter into a road maintenance agreement. CP 97-98. On October 2, 2015, counsel for the Bowers and Beltrames set a hearing for presentation of the order that Mr. Dunn was not in contempt and adopting a road maintenance agreement. CP 97-108. Although counsel for the Bowers and Beltrames stated, "The Road Maintenance Agreement has gone through several versions and is an effort to address the concerns raised by all parties, including Defendant," this was the first time counsel for Mr. Dunn saw the proposed road maintenance

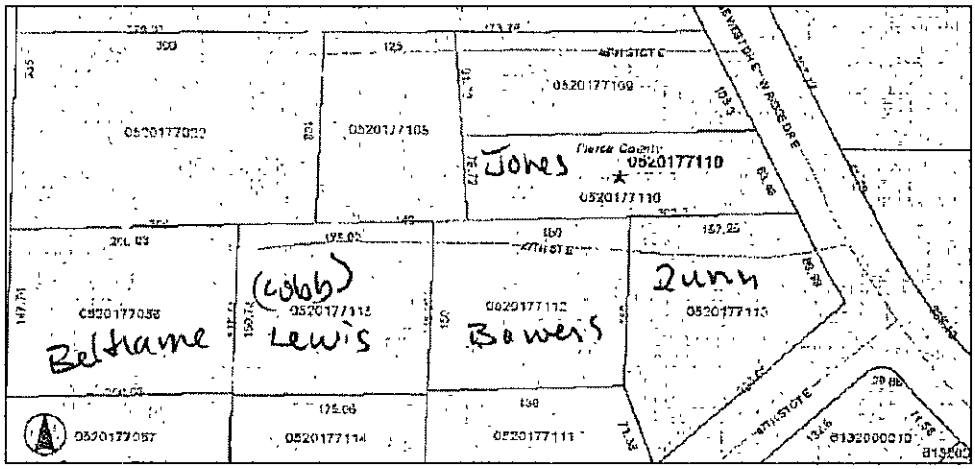
agreement. CP 98, 120; RP (10/16/15) 3-4. Through counsel, Mr. Dunn objected to entry of a road maintenance agreement because it would modify the existing express easement. RP (10/16/15) 4-5.

Acknowledging the parties did not agree to enter a road maintenance agreement, the court asked counsel for the Bowers and Beltrames what relief they were requesting. RP (10/16/15) 8:25-9:24. Respondents' counsel asked that the proposed road maintenance agreement be adopted as an order. *Id.* Recognizing the court could not force Mr. Dunn to sign an agreement, it took the matter under advisement for the purpose of incorporating a road maintenance agreement into an order as requested by respondents' counsel. RP (10/16/15) 9-10.

On November 23, 2015, the court wrote a letter to counsel, again confirming it could not compel the parties to enter into a road maintenance agreement. CP 111-112. But the court said it could enter an order that would, "place the parties in the same position as would have been had they been willing to agree." CP 111. The court then asked counsel for respondents to submit their proposed road maintenance agreement for modification by the court. CP 111-112. The court notified the parties either side could request a hearing after the order was entered. *Id.*

On December 9, 2015, the court issued another letter ruling and attached an Order Regarding Parties Rights and Responsibilities in Maintenance of Road ("Order Regarding Rights and Responsibilities").

CP 113-118. The Order Regarding Rights and Responsibilities applied to five lots, including Bowers', Beltrames', Lewis', Dunn's, and a new lot outside the plat owned by Robert Jones. Compare CP 118 to CP 150. The following diagram shows what lots were affected by the order:



CP 150.

Neither the Lewises nor Mr. Jones are parties to the litigation. CP 1, 27. The order allocated responsibility for maintenance of the road, established a voting structure for improvements, set a speed limit, established construction standards for the road, created rules for street signs, and ordered dispute resolution through court action only. CP 114-118. The letter ruling invited the parties to address the court if there were any questions. CP 113.

On December 17, 2015, Mr. Dunn filed a motion asking the court to reconsider its decision and vacate the Order Regarding Rights and Responsibilities. CP 119-150. Mr. Dunn objected generally to the

order being entered at all. CP 119-121; RP (1/29/16) 3-8. But he also specifically objected to the order applying to non-parties (the Lewises and Mr. Jones), expanding the easement to benefit property not included in the original easement, and applying public road construction standards to the gravel road. *Id.* Counsel for the Bowers and Beltrames responded that the Lewises and Mr. Jones agreed with the order and therefore Mr. Dunn was not prejudiced by their inclusion. CP 152:7-12.

The court granted Mr. Dunn's motion in part, removing the requirement that the road meet county road standards. CP 154. But the balance of Mr. Dunn's motion was denied. RP (1/29/16) 20-25. Mr. Dunn appeals. CP 155-161.

Argument

1. The standard of review is de novo because the court's order presents issues of mixed law and fact, and any errors in the trial court's findings are either not disputed or not supported by substantial evidence.

The error of law standard of review should be applied in this case because the issues presented are mixed law and fact. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008); *Rasmussen v. Employment Security Department of the State of Washington*, 98 Wn.2d 846, 658 P.2d 1240 (1983). Where the issues present both legal and factual questions, but where the factual issues are not disputed, the proper standard of review is de novo. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d at 441.

In the present case the trial court entered findings of fact at CP 115, paragraphs 1.1 through 1.11 (paragraphs 1.2 through 1.4, 1.6, 1.8 and 1.9 are missing). CP 115. Paragraphs 1.1 and 1.7 contain errors. It is unlikely respondents will dispute the errors, since the errors appear to be the result of simple mistake or confusion. But even if respondents assert the findings are correct, the findings are not supported by substantial evidence and should be reversed. *Griffin v. Thurston County*, 165 Wn.3d 50, 196 P.3d 141 (2008).

In paragraph 1.1, the error is finding the roadway was used by Mr. Jones. CP 115, paragraph 1.1. There is no evidence in the record to support the finding. CP 30, paragraph 3.5, 124, 146-150. Mr. Jones' lot has direct access off of Ridge West Drive. CP 150. There is no reason for him to use the private road. The next errors are in paragraph 1.7, which says the 1977 short plat was further subdivided to create 4 lots that served all the listed plats (including Mr. Jones'). CP 115, paragraph 1.7. Lots 3 and 4 of the 1977 short plat were subdivided in 1984 to create 5 lots, not 4. CP 127-131, 150. Also, the road is not identified on the Jones plat. CP 124, 146-150.

This appeal raises issues of mixed fact and law. Because the factual errors are either undisputed, or not supported by substantial evidence, the court should apply the error of law standard and review the issues de novo. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008).

2. The trial court exceeded its authority by entering an order establishing rights and responsibilities for the use, maintenance and improvement of an express roadway easement because that order varies or creates obligations among the parties they did not agree to.

The Order Regarding Rights and Responsibilities should be vacated because it imposes an agreement on the parties they did not make themselves. Even when the court is well-meaning, it is not proper to impose an agreement upon the parties. Our state supreme court observed:

> We have consistently held that we cannot upon general considerations of abstract justice make a contract for the parties that they did not make for themselves. *Merlin v. Rodine*, 32 Wn.2d 757, 203 P.2d 683; *Chaffee v. Chaffee*, 19 Wn.2d 607, 145 P.2d 244, and cases cited therein.

Jackson v. Domschot, 40 Wn.2d 30, 34, 239 P.2d 1058 (1952). Further,

> A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties. *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976).

Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 288, 654 P.2d 712 (1982).

The original issue in this case was whether Mr. Dunn could install speed bumps in the easement road, and if so, how many. CP 1-56. In their prayer for relief, respondents asked for an order confirming the existence of the easement, ordering Mr. Dunn to remove the speed bumps (which respondents had already removed), and restraining Mr. Dunn from installing speed bumps in the future. CP 35. Following trial, the court ordered Mr. Dunn could install one speed bump, specified

details of its construction, and required Mr. Dunn give 72 hours' notice prior to construction. CP 57-58. That was the full extent of the court's order following trial. *Id.*

The issue of a road maintenance agreement was first raised by the trial court at a hearing on June 5, 2015, more than a year after trial. CP 97-98. Four months after that, respondents filed a motion for entry of a road maintenance agreement. *Id.* Respondents repeatedly implied the proposed agreement was the product of negotiation, but it was not. CP 98, 120; RP (10/16/15) 3-9.

The trial court acknowledged it was improper to force the parties into a road maintenance agreement. CP 111, 113; RP (10/16/15) 8-10. Nevertheless, that is what the court did. By letter dated November 23, 2015, the court asked counsel for the Bowers and Beltrames to provide their proposed road maintenance agreement in Microsoft Word format so it could be used to craft the court's order. CP 111-112. With a few exceptions, the court's Order Regarding Rights and Responsibilities mirrors respondents' proposed road maintenance agreement, even incorporating factual errors from the proposed agreement. Assignments of Error 1-2; CP 101-108, 114-118. The following chart shows the correlations between the court's order and the proposed road maintenance agreement.

Order	Proposed Agreement
Paragraph 1.1	Third recital
Paragraph 1.5	Second recital
Paragraph 2.1	Paragraph 1
Paragraph 2.2	Paragraph 2
Paragraph 2.3	Paragraph 3
Paragraph 2.4	Paragraph 5
Paragraph 2.5	Paragraph 6
Paragraph 2.6	Paragraph 7

Compare CP 101-108 to 114-118.

In its oral rulings, the trial court seemed to acknowledge it was imposing an agreement on the parties, with the only distinction being Mr. Dunn was not required to sign the agreement. At the hearing on October 16, 2015, the court commented,

> Well, I don't think I can say, Mr. Dunn, you're required to sign this, I don't think I can do that. I think I can incorporate it into an order of the court which outlines all of the parties' obligations.

RP (10/16/15) 9:12-16. In January 2016, the court went on to explain:

> I think I do have the authority to make -- I don't have the authority to make the parties enter a road maintenance agreement. That's, of course, the *Buck Mountain* case. In *Bushy* and *Buck Mountain*, I think the appellate courts have made it clear that whether we're talking about express easements or we're talking about implied easements, the holdings of those cases apply. There was some argument in the subsequent of the two cases, *Buck Mountain*, that you can draw a distinction between implied and express easements, but these motions remain the same. And included in these holdings are certain

> obligations that are pretty much consistent with all easements and this is also set out in the *Restatement of Property Third*. That's this idea that parties have to share and share alike and contribute.

RP (1/29/16) 22:17-23:6.

Despite acknowledging it could not force the parties to enter a road maintenance agreement, the court imposed one on them anyway. By entering the order, the court would, "place the parties in the same position as would have been had they been willing to agree." CP 111. The court's order extends use of the road to new parties, establishes a speed limit, goes into detail about the process for requesting and paying for road repairs, establishes standards for road signs, and mandates court action as the only dispute resolution process. CP 115-117.

The original express easement was already clear about who was entitled to use the easement, and that the parties to the easement were responsible for sharing the costs of road maintenance and repair. CP 42, 127, 129, 131. By modifying the express easement, extending its use to other properties, and adding new terms, the trial court exceeded its authority. *Jackson v. Domschot*, 40 Wn.2d at 34.

The trial court referenced several cases in its oral ruling, apparently reasoning it was not imposing an agreement on the parties, but exercising its inherent authority to resolve disputes. RP (1/29/16) 8. The cases relied upon by the trial court consistently recognize parties must share the cost of maintaining an easement. But none of the cases support imposing an order on the parties such as the one this trial court did. In each of the cases referred to by the trial court, the question

raised was who was responsible for costs of maintaining an easement and in what shares. That is not an issue in the present case because the express easement already states the parties share in the cost of its maintenance and repair, and none of the parties dispute that obligation. CP 42, 127, 129, 131; RP (10/16/15) 5:2-6.

In *Buck Mountain Homeowner's Association v. Prestwich*, 174 Wn. App. 702, 308 P.3d 644 (2013), the Prestwiches shared a road used by a homeowner's association ("HOA"). The HOA had an express easement, but the Prestwich property was outside the HOA. A dispute arose over cost of road maintenance and repair when the HOA issued the Prestwiches an assessment. The HOA then sued for declaratory judgment and collection of the assessments. The trial court entered judgment for past due assessments and ordered the Prestwiches to enter into a road maintenance agreement with the HOA. The trial court held the Prestwiches must share equally in the cost of road maintenance expenses because of their use of the road. But court of appeals held it was error to require the Prestwiches to enter into an agreement with the HOA.

The *Buck Mountain* case relied in part on *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948). The *Bushy* case was an action to quiet title to a shared driveway. After deciding Weldon had an easement by implication, the trial court ruled the parties must share the cost of maintaining the driveway.

Like *Buck Mountain* and *Bushy*, the cases from out of state relied upon by the trial court all stand for the rule that costs of maintaining an easement must be shared equally absent an agreement to the contrary. *Beneduci v. Valadares*, 812 A.2d 41 (Conn. App. 2002) (common driveway) (attached as Appendix A); *Freeman v. Sorchych*, 245 P.3d 927 (Ariz. App. 2011) (roadway) (attached as Appendix B); *Janes v. Politis*, 361 N.Y.S.2d 613 (1974) (shared septic tank) (attached as Appendix C). The final case cited by the trial court is similar to the present case because it confirms the use of speedbumps is appropriate to regulate speeding on an easement, and then states the cost of maintenance should be shared absent an agreement. *Marsh v. Pullen*, 623 P.2d 1078 (Or. App. 1981) (attached as Appendix D).

In each of the cases relied upon by the trial court, the courts resolved the dispute about who was responsible for paying the costs of maintaining a shared easement. Again, that is not an issue in the present case because the express easement already allocates responsibility consistently with the rules stated in these cases. None of the cases relied upon by the trial court support entry of an order adding new parties to the easement, setting a speed limit, adopting processes for making road repairs, establishing standards for road signs, or mandating dispute resolution through court action only.

Just because the trial court turned the road maintenance agreement into an order and did not force the parties to sign it does not mean the order is not forcing the parties into an agreement. The trial

court itself stated this order, "place[s] the parties in the same position as would have been had they been willing to agree." CP 111. By imposing an agreement on the parties in the form of a court order, the court exceeded its authority and the order should be vacated.

3. The trial court exceeded its authority by entering an order purporting to bind non-parties, and extending the easement to property owned by a non-party who never used the road.

The Order Regarding Rights and Responsibilities should be vacated because it applies to non-parties. About ten months prior to the order, Robert and Debra Cobb sold their property. CP 92, 144; RP (10/16/15) 3. They did not join in the motion that led to the order. CP 66. The people who purchased the Cobb property, Josiah and Jennifer Lewis, were not joined as parties and did not join in the motion. CP 66, 144. They did not even testify in support of the motion. Similarly, Robert Jones is not a party to this case. CP 1-47. His property is not part of the three short plats benefitted by the private road easement. CP 123-131, 146, 148, 150.

When Mr. Dunn objected to extending the order to non-parties, the trial court concluded Mr. Dunn did not have standing to object. Specifically the trial court said:

> Now, as to the new landowners, I don't think either party here has the authority to speak for them pro or con. And if they [non-parties] have a problem with these requirements, and these requirements, really, I think -- not only do I not think they rewrite the short plat, I think all they do is incorporate some pretty fundamental common law notions and certainly fall within the ethical authority of the court. So for now, until I hear from these

> parties, I'm going to keep that portion of the order in effect.

RP (1/29/16) 23:25-24:9.

The statement that it is up to the non-parties to object to their inclusion in the order is contrary to law. *Martin v. Wilks*, 490 U.S. 755, 765, 109 S. Ct. 2180, 2186, 104 L. Ed. 2d 835 (1989) (attached as Appendix E). It is an abuse of discretion to extend orders to non-parties. *Trummel v. Mitchell*, 156 Wn.2d 653 (2006). Adding new parties, or substituting new parties for existing parties, generally requires serving a summons on the new party. RCW 4.08.140; *see also* CR 17, 19, 25.

The United State Supreme Court held joinder is necessary to bind a party.

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Martin v. Wilks, 490 U.S. 755, 765, 109 S. Ct. 2180, 2186, 104 L. Ed. 2d 835 (1989). Washington follows this rule.

> In general, even if a judgment purports to affect the rights of third parties, those parties are not bound by the judgment unless their interests were adequately represented by a party to the litigation. *See Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). The *Wilks* Court reiterated the "principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to

> which he has not been made a party by service of process." 490 U.S. at 761, 109 S.Ct. at 2184 (quoting *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)).

Loveridge v. Fred Meyer, Inc., 72 Wn. App. 720, 725-26, 864 P.2d 417, 419-20 (1993), *aff'd,* 125 Wn.2d 759, 887 P.2d 898 (1995). Even someone who appears as a witness in a case is not a party who has appeared for purposes of submitting to the court's jurisdiction. *In re Proceedings Before Special Inquiry Judge*, 78 Wn. App. 13, 16, 899 P.2d 800, 802 (1995).

Neither the Lewises nor Mr. Jones are parties in this case. CP 27. They did not appear in the matter, did not testify in support of the order, and were not called as witnesses. Nevertheless, the Order Regarding Rights and Responsibilities purportedly applies to them and the land they own. CP 114-118. The court's statement that the order applies to them and their property until they come forward and object is contrary to law and should be reversed. RP (1/29/16) 23:25-24:9; *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. at 725-726. When property is transferred to a new owner while proceedings are pending, a formal substitution of the new party is required for the order to be binding. *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 18-19, 985 P.2d 391 (1999).

Further, Mr. Jones's property was not benefitted by the road easement prior to the trial court's order. CP 124, 146-150. In fact, if asked, Mr. Jones may be happy to be part of the court order, because he gets a free easement he did not have before. If Mr. Jones, the Bowers, or the Beltrames tried to extend the easement for the benefit of Mr. Jones

it would have been a misuse of the easement. *Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986).

Because the Order Regarding Rights and Responsibilities applies to non-parties and further burdens the easement by extending it to property not previously benefitted, it was error for the trial court to enter the order. The Order Regarding Rights and Responsibilities should be vacated.

Conclusion

Mr. Dunn asks that the Order Regarding Rights and Responsibilities entered by the trial court on December 9, 2015, be vacated because it imposed a road maintenance agreement on the parties, and extended that agreement to non-parties.

Respectfully submitted this 10 day of May, 2016.

BLADO KIGER BOLAN, P.S.

Douglas N. Kiger, WSBA #26211
Attorney for James W. Dunn,
Appellant

Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 10th day of May, 2016, she placed with ABC Legal Messengers, Inc. an original Brief of Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same together with Verbatim Report of Proceedings for October 16, 2015, and January 29, 2016, for delivery to each of the following parties and their counsel of record:

William F Wright Attorney at Law 505 Broadway E #454 Seattle, WA 98102-5023 willw@wfwright.com	Carolyn Annette Elsey Attorney at Law The Kraft Law Group, P.S. 18275 State Route 410 E Ste 103 Bonney Lake, WA 98391 carolyn@kraftlawgroup.com

via U.S. Mail, first class, postage pre-paid.

Dated this 10th day of May, 2016, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.

Heather D. Alderson
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STATE OF WASHINGTON
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Appendix A

73 Conn.App. 795 (Conn.App. 2002)

812 A.2d 41

Joseph BENEDUCI

v.

Candido A. VALADARES.

No. 21950.

Appellate Court of Connecticut.

December 3, 2002.

Argued Sept 13, 2002

[812 A.2d 42] [Copyrighted Material Omitted]

[812 A.2d 43] [Copyrighted Material Omitted]

[812 A.2d 44]

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William J Ingersoll, Norwalk, for the appellant (plaintiff)

David Fite Waters, Norwalk, for the appellee (defendant)

FLYNN, J

The plaintiff, Joseph Beneduci, is the owner of property adjoining land of the defendant, Candido A Valadares A dispute arose between the parties regarding a common driveway, which passes over land owned by the plaintiff The parties presented evidence to an attorney trial referee (referee) regarding the plaintiff's claims for injunctive relief and damages and the defendant's counterclaim for damages [1] To determine the issues underlying this dispute, the referee was required to determine the extent of the defendant's rights to use the right-of-way The referee issued a report as to his findings and legal conclusions Thereafter, the trial court rendered judgment on the referee's report In doing so, that court, inter alia, enjoined the defendant "from engaging in any activity on the large right-of-way beyond using it for ingress and egress to his property and from interfering with any activity of the plaintiff on the large right-of-way which does not affect the defendant's use of the driveway for ingress and egress to his property " The court further enjoined the defendant "from using the easterly portion of the small right-of-way and from interfering with plaintiff's sign " The plaintiff challenges four aspects of the judgment on the referee's report (1) the creation of a passing area in the right-of-way, (2) the authorization

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to the defendant to make certain improvements to the right-of-way, (3) the restriction on the plaintiff from removing vegetation near the right-of-way, and (4) the allocation of maintenance costs of the right-of-way We affirm, in part, and reverse, in part the judgment of the trial court

The following facts, as set forth in the referee's report, are relevant to our resolution of the plaintiff's appeal "*Sometime prior to 1946 a right-of-way* was created over certain property located on Styles Lane in Norwalk, Connecticut (hereinafter the large right-of-way) That right-of-way is approximately 800 feet long about twenty-four feet wide, and partially fronts on Styles Lane, a public thoroughfare The large right-of-way was the only means of ingress and egress to a parcel of land of approximately four acres (the original parcel) In 1946 the original parcel was divided In that year, a map was prepared by Samuel [W] Hoyt, Jr Co Inc , entitled 'Map of Property Prepared for [Hermine] Peterson at Norwalk, Conn.' That map is filed with the Norwalk land records as Map No 2350 The map reflects that the original parcel had been divided into (a) a one acre parcel with a residence which became 6 Styles Lane and was ultimately purchased by the defendant in 1995, and (b) an undeveloped three acre parcel which the plaintiff subsequently purchased, and which became 10 Styles Lane

"The large right-of-way existed at the time of the division to service all of the original parcel Map No 2350 reflects that it was apparently granted in a deed **[812 A.2d 45]** previously filed at Volume 169-88 of the Norwalk land records That deed is not in evidence Therefore, the language of the original deed granting the large right-of-way that now services both 6 Styles Lane and 10 Styles Lane is not Before the court

"As part of the 1946 subdivision, a small right-of-way was created on the 10 Styles Lane parcel to connect

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the large right-of-way to 6 Styles Lane It is [a] four sided piece of land, the shortest of which is twenty-nine feet long, and the longest not quite forty-seven feet While Map No 2350 reflects the dimensions and location of the small right-of-way, no deed was presented at trial that purported to reflect the language of the grant of that right-of-way

Combined, the two rights-of-way are the only means of ingress and egress for 6 Styles Road Absent the deeds, there is no proof that the rights-of-way were for anything other than ingress and egress, which has been their traditional use, and I find that they did not include parking, landscaping or storing of logs

"In a deed filed on October 21, 1970, in the Norwalk land records at Volume 737, Page 572, Helen Merrill and Anita Ross sold approximately three acres of undeveloped land to Marissa [Beneduci] and [the plaintiff] Joseph Beneduci, where a dwelling, 10 Styles Lane, was ultimately built. The deed conveying the land referred for its description to Map 1520, excepting the one acre premises described in Map 2350, which now belongs to the defendant The deed purported to convey to Mr and Mrs. [Beneduci] 'a right of way from said premises to Styles Lane as shown on said maps,' i.e., the large right-of-way Accordingly, access to 10 Styles Lane was over the same large right-of-way as to 6 Styles Lane. However, it appears that Merrill and Ross were not the original grantors of the right-of-way, but rather successors to the original grantee The deed also reflects that the land was conveyed free and clear of encumbrances except, *inter alia*, 'a right of way at the extreme southerly portion of said premises as shown on the above Map No 2350,' i.e., the small right-of-way

"In a warranty deed filed with the Norwalk land records on August 1, 1995, Sally Bochner and Jane Cogie, successor owners of 6 Styles Lane, conveyed those premises to defendant Candido Valadares, referring

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to Map No 2350 for a full description of the property Once again, Bochner and Cogie were successors in interest of the original grantees of the rights-of-way The conveyance purported to be 'Together with a right of way for all lawful purposes in, through, over and upon a small portion of the property of [Hermine] Peterson bounding the above described premises [on the] southeast thereof and more particularly designated as "Right of way" on the aforesaid map, in common with [Hermine] Peterson, her heirs and assigns and together with an easement of way, leading [from] Styles Lane to the southerly line of the first mentioned, "Right of way" herein, in common with [Hermine] Peterson, her heirs and assigns. Reference to said map is hereby made and had for a more particular description and location of said premises on the rights of way above mentioned.' Accordingly, Bochner and Cogie were not *granting* a right-of-way to [the defendant] in the language of the deed, but rather conveying to him whatever rights of way they had previously acquired, the dimensions (but not the nature) of which were reflected in Map 2350

"After purchasing his property, [the defendant] commenced activities on both the large right-of-way and the small right-of-way that [the plaintiff] objected to Prior to 1995, the large right-of-way had been bordered by trees and vegetation, and **[812 A.2d 46]** used solely as a driveway But [the defendant] removed trees, bushes and vegetation, created and used parking areas, and stored firewood on the sides of the driveway on the large right-of-way He also built a wall with pillars, which narrowed the Styles Lane entrance to the large right-of-way

"Prior to 1995, the eastern portion of the small right-of-way had been undisturbed, containing trees and vegetation [The defendant] removed trees and vegetation from the eastern side of the small right-of-way which historically had not been used for travel The trees and vegetation did not interfere with its normal use Over

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time, he unnecessarily expanded the use of the eastern side for travel and turnaround purposes, disturbed a sign [the plaintiff] had placed to indicate which was his residence and removed or destroyed boundary markers or fences installed by [the plaintiff] defining his property line. [The defendant] also created a parking space on a neighbor's property, using a portion of the right-of-way to get to it

"When it became known to both parties that ownership of the large right-of-way was in question, [the plaintiff] commenced proceedings in Norwalk Probate Court to have the apparent record owner of the large right-of-way declared dead and to have a contract for the purchase of the large right-of-way approved by the Probate Court [The defendant] objected, and the property was put up for sale by sealed bid, with the plaintiff and the defendant [being] the only bidders. [The plaintiff] was the successful bidder and obtain[ed] a deed

"After [the plaintiff] became the title owner of the large right-of-way, he placed logs along the side of the driveway [The defendant] removed objects placed by [the plaintiff] along the driveway to prevent parking Finally, when snowplowing, [the defendant] removed some gravel." (Emphasis in original.)

The plaintiff commenced the present action against the defendant and requested that the court, inter alia, enjoin the defendant from performing any act utilizing the right-of-way [2] for any purpose other than ingress

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and egress The defendant's counterclaim contained no particular claims for relief. The matter was submitted to a referee who, after hearing the evidence and viewing the disputed property, found the facts previously set forth and reached certain conclusions of law The court rendered

judgment in accordance with the referee's report, from which the plaintiff appeals. The defendant did not cross appeal.

We begin our analysis of the plaintiff's claims by setting forth our standard of review. "The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." *Morton Buildings, Inc. v. Bannon*,

[812 A.2d 47] 222 Conn. 49, 53, 607 A.2d 424 (1992). We must also bear in mind the fact that the referee visited the disputed property. "A view of the subject matter in dispute may be taken by the court, in the exercise of a sound discretion, whenever it is necessary or important to a clearer understanding of the issues. Information obtained through a visual observation of the locus in quo is just as much evidence as any other evidence in the case. Evidence obtained by visual inspection is not subject to appellate review. Conclusions based on such evidence are entitled to great weight on appeal, and are subject to review only for clear error." (Citations omitted, internal quotation marks omitted.) *Castonguay v. Plourde*, 46 Conn. App. 251, 262, 699 A.2d 226, cert. denied, 243 Conn. 931, 701 A.2d 660 (1997).

The plaintiff's first claim relates to the creation of a passing area in the right-of-way. [3] The plaintiff argues

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that the referee's conclusion was without legal authority. The plaintiff cites *Wilson v. DeGenaro*, 36 Conn. Supp. 200, 415 A.2d 1334 (1979), aff'd, 181 Conn. 480, 435 A.2d 1021 (1980), for the proposition that where a definite right-of-way exists, a court cannot give a party more than that party is entitled to receive. *Wilson* is inapposite, as are other similar cases dealing with the interpretation of a right-of-way granted in a deed, because the language of the original, pre-1946 deed that created the right-of-way was not presented in evidence by the plaintiff to the referee. In fact, the plaintiff apparently relied exclusively on later conveyances in the chain of title containing references to the "map of property prepared for [Hermine] Peterson" dated 1946. The best indication that we have of the location of the right-of-way is contained in the "map of property prepared for [Hermine] Peterson," which states that the right-of-way was "granted in deed Vol. 169-88, Norwalk Land Records." Beyond this reference, though, we have no indication of what is contained in that deed. By failing to offer any evidence of the metes and bounds of the right-of-way as set by that deed, "the plaintiff acted at his peril that the court would not make the more specific findings that he desired." *Kelley v. Tomas*, 66 Conn. App. 146, 167 n. 4, 783 A.2d 1226 (2001).

The referee was faced with a situation in which the parties agreed that a right-of-way existed across the plaintiff's property as shown on the "map of property prepared for [Hermine] Peterson," but the parties did not agree to the extent of the usage the defendant might make of the right-of-way. Absent any evidence of the language of the deed creating the right-of-way, the referee

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correctly relied upon *Pudim v. Moses*, 20 Conn. Supp. 311, 134 A.2d 478 (1957), for the proposition that when an easement is not specifically defined, "the rule is that the easement be only such as is reasonably necessary and convenient for the purpose for which it was created." Id., at 313, 134 A.2d 478. In his analysis, the referee considered *Strollo v. Iannantuoni*, 53 Conn. App. 658, 734 A.2d 144, cert. denied, 250 Conn. 924, 738 A.2d 662 (1999). In *Strollo* this court stated that "[t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit.

[812 A.2d 48] The decision as to what would constitute a reasonable use of a right-of-way is for the trier of fact whose decision may not be overturned unless it is clearly erroneous." (Citation omitted, internal quotation marks omitted.) Id., at 660-61, 734 A.2d 144.

The plaintiff did not ask the referee to interpret the language of the deed granting the right-of-way. In the absence of the deed, the plaintiff was asking the referee to make a factual determination as to what would constitute a reasonable use of the right-of-way. As such, we cannot overturn the court's decision unless, based on the record, we conclude that the decision was clearly erroneous. See *Somers v. LeVasseur*, 230 Conn. 560, 564, 645 A.2d 993 (1994). The plaintiff, however, did not provide a transcript of the testimony before the referee to either the trial court or this court. We are also not in a position to review the referee's visual inspection of the disputed property. [4] See *Castonguay v. Plourde*, supra, 46 Conn. App. at 262, 699 A.2d 226. The only indication of the testimony presented at trial is the referee's findings of fact. On the basis of those findings we cannot conclude that the court's decision as to the necessity of a passing area, was clearly erroneous.

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The plaintiff also challenges the portion of the referee's report that allows the defendant to make repairs or

improvements [5] The plaintiff asserts that there was no evidence of any existing improvements and that the referee did not precisely limit the improvements the defendant was allowed to make [6] We disagree with both assertions As to the first assertion, the referee's report included the finding that "when snowplowing, [the defendant] removed some gravel " In addition, one or both of the parties entered photographs as evidence of the condition of the right-of-way These photographs show a gravel driveway, not a dirt driveway **[812 A.2d 49]** without any improvements as the plaintiff's argument suggests The plaintiff's second assertion, that the referee did not limit the improvements that the defendant may make,

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is also unsupported by the record The referee's report clearly describes two improvements the defendant may make installing traprock to a depth of 2 5 inches and grading the right-of-way The remainder of the referee's conclusions enjoined the defendant from engaging in any activity on the right-of-way beyond using it for ingress and egress to his property and making the improvements previously set forth [7]

The third claim is the plaintiff's challenge to that portion of the referee's report restricting the plaintiff from removing vegetation near the right-of-way The referee, in his conclusions of law, stated "Neither party may remove vegetation, shrubbery, weeds vines or trees except to the extent they are within the nine to eleven foot right-of-way " In adopting the referee's report, the court made this a part of its judgment In analyzing the plaintiff's third claim, we must address a jurisdictional issue raised by the referee's conclusion

We note that even though the issue of jurisdiction was not argued by either party, a court has the authority to consider this issue sua sponte "[Our Supreme Court] has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties or by the court sua sponte, at any time [T]he court has

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a duty to dismiss, even on its own initiative, any appeal that it lacks jurisdiction to hear Moreover, [t]he parties cannot confer subject matter jurisdiction on the court, either by waiver or by consent " (Citations omitted, internal quotation marks omitted) *Webster Bank v Zak*, 259 Conn 766, 774 792 A 2d 66 (2002)

"The determination of whether subject matter jurisdiction exists is a question of law and thus, our review is plenary " *Hultman v Blumenthal*, 67 Conn App 613, 615, 787 A 2d 666, cert denied, 259 Conn 929, 793 A 2d 253 (2002) "Jurisdiction is the power in a court to hear and determine the cause of action presented to it To constitute this there are three essentials first, the court must have cognizance of the class of cases to which the one to be adjudged belongs, second, the proper parties must be present, and third, the point decided must be, in substance and effect, within the issue " (Citation omitted, internal quotation marks omitted) *Lobsenz v Davidoff*, 182 Conn 111, 116, 438 A 2d 21 (1980) We note that the defendant in his counterclaim did not request that the referee impose this restriction upon the plaintiff Apparently, the issue of whether the plaintiff should be restricted from removing vegetation on his property was never raised in the pleadings

[812 A.2d 50] [8] For that reason, we must reverse the trial court's decision as to that part of the referee's report because the court lacked jurisdiction as to this issue [9]

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The plaintiff's final claim pertains to the allocation of maintenance costs of the right-of-way The referee's report states in pertinent part "The cost of removing any obstructions or materials not in accordance with this opinion should be borne by the parties that placed them Thereafter, since both parties use the driveway, any routine maintenance of the right-of-way in its current state, as modified by this decision, should be shared equally between the parties, or their respective heirs, successors and assigns " The plaintiff cites *Center Drive In Theatre, Inc v Derby* 166 Conn 460, 352 A 2d 304 (1974), which sets forth the general rule that "[w]here the instrument is silent, the owner of an easement has a duty to make such repairs as are necessary for the owner of the land to have the reasonable use of his estate " Id , at 464, 352 A 2d 304 This general rule, however, has been applied to situations where the easement benefits only the dominant estate See, e g , id at 460, 352 A 2d 304 (city owning easement for pipeline under servient estate), *Powers v Gremer Construction Inc* , 10 Conn App 556, 524 A 2d 667 (1987) (holding owner of easement for drainage purposes liable for flooding caused by failure to repair) We must now determine whether this rule applies with equal force in a situation such as the present one where both the dominant and the servient estates derive the same benefit from the common use of a driveway We conclude that it does not

The plaintiff only recently became the owner of the servient estate over which the common driveway passes Prior to the plaintiff's purchasing the servient estate, he had an easement over the disputed driveway just as the defendant did At that time, the general rule set forth in *Center Drive In Theatre, Inc v Derby*,

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supra, 166 Conn at 464, 352 A 2d 304, would have required both the plaintiff and the defendant to contribute jointly to the costs for repair and maintenance of the right-of-way that served both their parcels The former owner of the servient estate, not using the property for the purpose authorized by the easement, was under no obligation to contribute to the maintenance of the right-of-way *Kelly v Ivler,* 187 Conn 31, 45, 450 A 2d 817 (1982) When the plaintiff became the owner in fee of the servient estate, his easement was extinguished by merger, see *Blanchard v Manson,* 84 Conn 429, 434, 80 A 206 (1911), but he continued to use the driveway as the means of ingress and egress to **[812 A.2d 51]** his house The referee reasonably determined that both the plaintiff and the defendant used the driveway If the defendant did not have the easement over the driveway, the plaintiff would bear the full cost of repairs and maintenance himself We cannot conclude that the defendant should be required to subsidize the plaintiff's use of his own property It is appropriate that both parties contribute to the maintenance of the driveway because both parties contribute to the wear on the driveway We conclude that the proper rule is, absent language in a deed to the contrary, "[j]oint use by the servient owner and the servitude beneficiary of the servient estate for the purpose authorized by the easement gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate used in common " 1 Restatement (Third), Property, Servitudes § 4 13(3), pp 631-32 (2000) This was the result reached by the court, and, so, we affirm that portion of the judgment requiring the plaintiff and the defendant to share the costs of routine maintenance

The judgment is reversed in part and the case is remanded with direction to render judgment as on file

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except as modified to eliminate the restriction on the plaintiff from removing vegetation on his property

In this opinion the other Judges concurred

Notes

[1] The plaintiff's claims for relief were as follows

"1 That the defendant be enjoined from performing any act or utilizing the right-of-way for any purpose except ingress and egress

"2 Money damages

"3 Attorney fees

"4 Costs and fees

"5 Such other and further relief the court deems appropriate "

The defendant's counterclaim did not plead a claim for relief, but the defendant did plead damages in the body of his complaint

[2] Although the referee's report describes the driveway as two sections ("the large right-of-way" and "the small right-of-way"), there is no need to employ this distinction in this opinion, because the plaintiff is now the owner in fee of the entire servient estate over which both sections pass, and there is no claim by the plaintiff that the two sections should be treated differently for the purposes of this appeal Therefore, we will describe both sections collectively as either "the right-of-way" when analyzing the defendant's rights or simply "the driveway" when analyzing the plaintiff's rights and duties.

[3] The referee's conclusions of law at paragraph 7 c of his report states "One passing area, in a location to be agreed upon by the parties within thirty days, and approximately half way up the large right-of-way, should be created It shall be eighteen feet wide and twenty-five feet long so that it will allow two passenger-sized vehicles to pass each other If the parties cannot agree upon the location of the area within thirty days, the matter may be referred back to me for such determination."

[4] We are able to review the photographs of the right-of-way that are part of the record. In the absence of testimony explaining the location and perspective of the pictures, though, these photographs provide little assistance in determining whether a passing area was necessary

[5] Paragraph 7 g of the referee's conclusions of law states "The driveway and the allowed portion of the small right-of-way, although passable, are in need of some repair and may be graded to even them out The question is who should pay for it The law is settled that the obligation of the owner of the servient estate, as regards the easement, is not to maintain it, but to refrain from doing or suffering something to be done which results in an impairment of it ' *Kelly v. Ivler,* 187 Conn 31, 45, 450 A.2d 817 (1982). The defendant claims the improvements should be paid for jointly but the plaintiff is perfectly happy with the current state of affairs Under the circumstances, since the driveway is still passable, if the defendant wants to improve it, that expense should not be forced upon the plaintiff, and the defendant should pay for the improvements Likewise, the defendant may additionally, at his expense, install 3/4"' traprock spread to a depth of 2 5"' for the length of the

right-of-way. See *Kuras v. Kope*, 205 Conn. 332, 346, 533 A.2d 1202 (1987)."

[6] The plaintiff, in his reply brief, raises two issues that he did not raise in his initial brief to this court: (1) whether the referee's finding that the right-of-way was "passable" should prevent the defendant from making improvements, and (2) whether there is a legally significant distinction between "improvements" and "maintenance." The plaintiff, however, failed to raise these issues in his initial brief. "It is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 48, n. 42, 717 A.2d 77 (1998). Therefore, we will not determine whether grading and installing traprock on the right-of-way are improvements or merely repairs. Merely for the sake of convenience, we refer to the work the defendant may do as "improvements."

[7] Paragraph 7. a. of the referee's conclusions of law states: "The defendant should be enjoined from engaging in any activity on the large right-of-way beyond using it for ingress and egress to his property and further enjoined from any activity interfering with any activity of the plaintiff on the [large right-of-way] which does not affect the defendant's use of the driveway for ingress and egress to his property. He should be enjoined from using the easterly portion of the small right-of-way and from interfering with the plaintiff's sign."

Furthermore, paragraph 7. e. of the referee's conclusions of law states: "The plaintiff may restrict the defendant's access from the right-of-way to parking areas not located within the right-of-way. The purpose of the right-of-way was for ingress and egress *to the defendant's residence* and not to facilitate his parking on other people's property." (Emphasis in original.)

[8] The defendant pleaded in paragraph 3. B. of his counterclaim that the plaintiff had "attempted to prevent the defendant from removing natural and manmade obstacles from the rights-of-way." The defendant, however, never sought to prevent the plaintiff from removing vegetation or other natural obstacles on or near the right-of-way.

[9] The defendant states that he has no objection to the plaintiff's removing vegetation. We note that the plaintiff is the owner in fee of the servient estate over which the defendant has a right-of-way. The referee restricted the plaintiff from removing vegetation on his property for no reason that we can discern from the record. There was no finding that would suggest that this restriction upon the plaintiff was necessary to prevent him from interfering with the defendant's use of the right-of-way. The rights and duties of the plaintiff as owner of the servient estate are clear. "The law is settled that the obligation of the owner of the servient estate, as regards an easement, is not to maintain it, but to refrain from doing or suffering something to be done which results in an impairment of it." (Internal quotation marks omitted.) *Kelly v. Ivler*, 187 Conn. 31, 45-450 A.2d 817 (1982).

Appendix B

226 Ariz. 242 (Ariz.App. Div. 1 2011)

245 P.3d 927

Gerald C. FREEMAN and Janice B. Freeman, husband and wife, *Plaintiffs/Appellants*,

v.

Donald R. SORCHYCH, a single man, Defendant/Appellee.

No. 1 CA-CV 09-0720.

Court of Appeals of Arizona, First Division, Department D.

January 13, 2011

[245 P.3d 928] [Copyrighted Material Omitted]

[245 P.3d 929] Mahaffy Law Firm, P.C. By Steven C. Mahaffy, Chandler, Attorneys for Plaintiffs/Appellants

Carol Lynn de Szendeffy, Carefree, Attorney for Defendant/Appellee

OPINION

WINTHROP, Presiding Judge

¶ 1 This case raises a question not previously addressed in Arizona. When multiple dominant estate holders use an easement, must they share in the costs necessary to maintain and repair that common easement, even in the absence of a cost-sharing agreement or a provision imposing such an obligation within the document conveying the easement? Gerald C. and Janice B. Freeman brought an action for contribution and unjust enrichment against Donald R. Sorchych in an effort to recoup a portion of expenses the Freemans incurred related to a roadway easement they and Sorchych use as the sole means of access to their respective properties. Recognizing that no case in Arizona has previously required contribution in such a situation, the trial court found in favor of Sorchych on the Freemans' claim for contribution, and further determined that the Freemans had failed to prove their claim for unjust *enrichment*. The Freemans appeal the trial court's judgment in favor of Sorchych. For the following reasons, we hold that the Freemans may seek equitable contribution from Sorchych for expenditures made for necessary roadway maintenance and repairs. However, we affirm other determinations made by the trial court, including its decision regarding the Freemans' claim for unjust enrichment. Accordingly, we affirm the judgment in part, vacate in part, and remand for supplemental proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶ 2 The Freemans and Sorchych are neighboring landowners who each own multiple acres of property in rural Cave Creek, Arizona. The Freemans' homestead consists of approximately thirty acres of property and Sorchych owns approximately ten acres of property, including his home. The sole method of access to both the Freemans' and Sorchych's properties is an appurtenant roadway easement that, due to erosion from rain and other environmental factors, requires periodic maintenance and grading. The Freemans and Sorchych are apparently the only regular users of the easement, which was created in October 1969 to benefit a predecessor in interest.[1] In 1991 Jerry Foster, a property owner subsequent to the predecessor in interest, sold much of his land to the Freemans, who built their home there during approximately 2003-2005.[2] Foster sold his remaining property and home to Sorchych in December 2000.[3]

¶ 3 On October 18, 2004, the Freemans filed a complaint in Scottsdale Justice Court, alleging that they had hired T.L. Hanks Excavating, Inc. to perform maintenance on the roadway easement but that on approximately May 20, 2004, Sorchych had tortiously interfered with that maintenance work, causing **[245 P.3d 930]** the Freemans to incur additional costs of $2,162.18.

¶ 4 In August 2005, the Freemans filed a First Amended Complaint, further alleging they were entitled to a one-half contribution for roadway maintenance and repair from Sorchych as the only other contiguous landowner who regularly used the roadway easement. The Freemans alleged they had expended approximately $3,685.00 in 2003, $14,633.74 in 2004, and $14,410.20 in 2005 as necessary maintenance costs on the roadway easement. They further alleged that, at their request, Sorchych had initially agreed to contribute payment for necessary roadway maintenance and repair, but had later refused to do so. The amended complaint sought damages on the theories of contribution, unjust enrichment, and tortious interference, seeking fifty percent of the allegedly necessary roadway maintenance costs,[4] $2,162.18 for the additional costs incurred as a *result* of *Sorchych*'s alleged tortious interference, and costs and attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-349 (2003). As a result of the amended complaint, the case was transferred to superior court.

¶ 5 In his answer, Sorchych asserted that the Freemans' expenditures were unreasonable and that he had not approved or agreed to contribute payment for the roadway's maintenance and repair, but that he had offered the reasonable use of his tractor for such maintenance and repair He also sought costs and attorneys' fees pursuant to A R S § 12-349 [5]

¶ 6 The Freemans filed a motion for summary judgment as to all counts against Sorchych, who filed a response and cross-motion for summary judgment The trial court denied the parties' motions for summary judgment, with the exception that it granted partial summary judgment in favor of the Freemans with regard to their tortious interference with contract claim [6]

¶ 7 On March 24 and 25, 2009, the trial court held a bench trial *de novo* on the remaining claims At trial, the parties agreed that the easement in dispute was one that granted " an easement for existing roadway as it exists on October 2, 1969" , thus, a potentially critical factual question for the court was the condition of the roadway in 1969 [7] The Freemans argued that all of the **[245 P.3d 931]** expenditures made were to maintain the road in the same condition as it existed in 1969 and they further posited that the easement carried with it an unexpressed but concomitant obligation of contribution, at least with regard to maintenance of the real property owned by third parties Sorchych maintained that no right of contribution existed because the easement did not expressly require contribution, no statute mandated contribution, and no Arizona case law had addressed whether joint users of an easement have to share maintenance, much less required them to do so Sorchych further disputed the need for the expenditures, maintaining that the Freemans were seeking his contribution to improve rather than simply maintain the roadway, and he also disputed the amounts expended

¶ 8 At the end of the first day of trial, the court concluded that, although the Freemans had presented an equitable argument regarding their claim for contribution, they had demonstrated no legal right to seek contribution from Sorchych, " an unrelated party who owes no contractual or other obligation to [the Freemans] to make substantial contributions for expenditures made for a road situated on real estate owned by a third party based upon the grant of a 1969 easement that grants the parties' predecessor in interest an access right without any corresponding maintenance obligation " [8] At the conclusion of the Freemans' case, the court further determined that the Freemans could not recover under an unjust enrichment theory because, although they had expended funds that benefitted both themselves and Sorchych, they had not established that they expended any funds solely for Sorchych's benefit, i e , to their detriment

¶ 9 In September 2009 the trial court issued a signed judgment, dismissing the Freemans' claim for contribution and granting Sorchych's motion for judgment dismissing the Freemans' claim for unjust enrichment The court also awarded costs in the amount of $191 00 and, upon reconsideration, attorneys'

[245 P.3d 932] fees in the amount of $5 000 00 to Sorchych

¶ 10 The Freemans filed a timely notice of appeal We have jurisdiction pursuant to A R S § 12-2101(B) (2003)

STANDARD OF REVIEW

¶ 11 We are bound by the trial court's findings of fact unless those findings are clearly erroneous *Farmers Ins Co* 195 Ariz at 28, ¶ 19, 985 P 2d at 513 Additionally, we will not disturb the trial court's judgment dismissing the Freemans' claims absent an abuse of discretion *See City of Tucson v Clear Channel Outdoor, Inc* , 218 Ariz 172, 180, ¶ 16, 181 P 3d 219, 227 (App 2008) To the extent the trial court's decisions were based on an interpretation and application of the law, we review those decisions *de novo See Hall v Lalli*, 194 Ariz 54, 57, ¶ 5, 977 P 2d 776, 779 (1999), *State Comp Fund v Yellow Cab Co* , 197 Ariz 120, 122, ¶ 5, 3 P 3d 1040, 1042 (App 1999)

ANALYSIS

¶ 12 The Freemans argue that the trial court erred in entering judgment in favor of Sorchych on their claims for contribution and unjust enrichment They contend that, as the beneficiary of a roadway easement that provides the only means of ingress and egress to his home, Sorchych must share in the expense of maintaining the roadway in an amount proportionate to his use

I Contribution

¶ 13 The Freemans first contend that the trial court erred in denying their contribution claim In this case, the document conveying the easement does not expressly provide for a duty to repair or maintain the easement, and the parties have no agreement regarding such obligation Nonetheless, we conclude that the owners of the easement have the shared duty to repair and maintain the easement

¶ 14 In Arizona, contribution is an equitable remedy that has been recognized by the Arizona courts and legislature in limited circumstances most notably in the insurance and tort contexts *See, e g , Cal Cas Ins Co v Am Family Mut Ins Co* , 208 Ariz 416, 417-18, 422, ¶ ¶ 1-2, 24, 94 P 3d 616, 617-18 622 (App 2004), *Mut Ins Co of Ariz v Am Cas Co of Reading Pa* , 189 Ariz 22, 26, 938 P 2d 71, 75 (App 1996), *Am Cont'l Ins Co v Am Cas Co of Reading Pa* , 183 Ariz 301, 302, 903 P 2d 609,

610 (App 1995), *W Igric Ins Co v Indus Indem. Ins Co*, 172 Ariz 592, 595, 838 P 2d 1353 1356 (App 1992), see also A R S §§ 12-2501 to -2509 (2003) (adopting the Uniform Contribution Among Tortfeasors Act) *See also Fischer v Sommer*, 160 Ariz 530, 531, 774 P 2d 834, 835 (App 1989) (recognizing the right of a former spouse to seek contribution for payment of community debts not allocated by the divorce decree) However, Arizona has not previously addressed contribution as an equitable remedy permitting one dominant tenant to require another dominant tenant to contribute to repair and maintenance of an easement

¶ 15 Nonetheless, as Sorchych himself acknowledges Arizona courts may modify common law that appears unjust or out of step with the times *See Villareal v State Dep't of Transp.*, 160 Ariz 474, 477, 774 P 2d 213, 216 (1989) (citing *City of Glendale v. Bradshaw*, 108 Ariz 582, 584, 503 P.2d 803, 805 (1972)) In the absence of controlling statutory or case authority, Arizona courts generally follow the Restatement of the Law on a particular subject if its position, as applied to the claim at issue, " is logical, furthers the interests of justice, is consistent with Arizona law and policy, and has been generally acknowledged elsewhere " *Ramirez v Health Partners of S Ariz*, 193 Ariz 325, 332 ¶ 26, 972 P 2d 658, 665 (App 1998) (citing *Ft Lowell-NSS Ltd P'ship v Kelly*, 166 Ariz 96, 800 P.2d 962 (1990), *Cannon v Dunn*, 145 Ariz 115, 116, 700 P 2d 502, 503 (App 1985)) Further, Arizona courts routinely look to guidance from courts of other states on matters of first impression *See, e g , Iritschler v Allstate Ins Co*, 213 Ariz 505, 513, ¶ 20, 144 P 3d 519, 527 (App 2006) (citing *Hull v DaimlerChrysler Corp* 209 Ariz 256, 258, ¶ 10, 99 P 3d 1026, 1028 (App.2004))

[245 P.3d 933] ¶ 16 Relying on a portion of comment (b) to § 485 of the Restatement (First) of Property (" Restatement (First)") (1944) the Freemans contend that dominant easement owners must share in the maintenance and repair costs of an easement even absent language in the conveyance document imposing such an obligation and even absent an agreement between the parties to share in the costs The text of § 485 provides, " In the case of an easement created by conveyance, the existence and the extent[1] of any privilege and any duty of the owner of the easement to maintain, repair and improve the condition of the servient tenement for the purpose of increasing the effective uses of the easement or protecting the interests of the possessor of the servient tenement are determined by the conveyance " Thus, § 485 itself stands simply for the general rule of law that the rights and duties of parties to a conveyance are determined by the terms of the conveyance itself

¶ 17 Nonetheless the portion of comment (b) relied on by the Freemans states, " If the language of a conveyance creating an easement is so indefinite as not clearly to provide for a duty to repair, the inference to be drawn is that such duty as exists is upon the owner of the easement " Restatement (First) § 485 cmt b Courts relying on this language have generally found that, in the absence of an agreement to the contrary, as between dominant and servient landowners, a dominant owner has not only the *right, but the duty, to maintain and repair* the easement despite the lack of an express provision mandating that duty *See, e g , Triplett v Beuckman*, 40 Ill App 3d 379, 352 N E 2d 458, 460 (1976), *Christmas v Virgin Islands Water & Power Auth*, 527 F Supp 843, 848 (D Virgin Islands 1981) [9]

¶ 18 Paragraph (b) continues on, however, to make clear that it addresses rights and responsibilities as between the servient and dominant tenants, not two dominant tenants, and it indicates that, under the Restatement (First), no implied duty exists for a dominant tenant to maintain and repair an easement for his or her own benefit

Despite the fact that nongratuitous conveyances of easements are construed favorably to the conveyee it is not assumed, even in the case of such conveyances, that a conveyor agrees to maintain or repair the premises subject to the easement for the purpose of enabling the conveyee to enjoy the uses authorized by it If any such duty exists, it is assumed to be on the owner of the easement *The duty on him is limited in character, however, for there is, of course no duty to maintain and repair for his own benefit* The duty is for the benefit of the owner of the servient tenement and goes only to the extent of requiring the owner of an easement to so maintain and repair the premises subject to the easement as to prevent unreasonable **[245 P.3d 934]** interference with the use of the servient tenement by the possessor of it

Restatement (First) § 485 cmt b (emphasis added)

¶ 19 More recently, however, § 4 13 of the Restatement (Third) has addressed the rights and responsibilities of maintaining and repairing an easement as between two or more dominant tenants

Unless the terms of a servitude determined under § 4 1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows

(4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate [10]

Restatement (Third) § 4 13(4) (footnote added) [11]

¶ 20 Further, common law from other states has developed addressing the responsibility of tenants using an easement regardless of their status as servient or dominant tenant These cases set forth a general principle that a party having rights to use an easement should share in the maintenance and repair expense for that easement *See Barnard v Gaumer*, 146 Colo 409, 361 P 2d 778, 781 (1961) (noting that " the burden of upkeep should be distributed between dominant and servient tenements in proportion to their relative use of the road as nearly as such may be ascertained"), *Story v Bly* 217 P 3d 872, 878-79 (Colo Ct App 2008) (relying on § 4 13 of the Restatement (Third)), *Lakeland Prop Owners Ass'n v Larson* 121 Ill App 3d 805, 77 Ill Dec 68, 459 N E 2d 1164, 1170 (1984) (recognizing that, " where a grantee has an easement which he shares with others, his duty to repair and maintain it must be apportioned with all other easement holders based upon the extent of the individuals' use of the easement"), *Larabee v Booth*, 463 N E.2d 487, 492 (Ind Ct App 1984) (concluding that when a dominant and servient tenant both use an easement, the court may apportion the cost of repairs between them), *Bina v Bina* 213 Iowa 432, 239 N W 68 71 (1931) (allocating specific percentage shares of responsibility among the easement users) *Drolsum v Luzuriaga*, 93 Md App 1, 611 A 2d 116, 125 (1992) (remanding for the trial court to consider the use and benefit of a relocated easement in effecting an equitable distribution of the burden of relocation), *Marvin E Nieberg Real Estate Co v Taylor-Morley-Simon, Inc* , 867 S W 2d 618, 623 (Mo Ct App 1993) (" [T]he general rule is that all users should contribute to maintenance in proportion to their use "), *Cohen v Banks*, 169 Misc 2d 374, 642 N Y S 2d 797, 800 (N Y Just Ct 1996) (holding that the dominant and servient estates, which made common and equal use of the main water line, should be equally responsible for the cost of repair), *Lindhorst v Wright*, 616 P 2d 450, 454-55 (Okla App 1980) (" In this case the duty and cost of maintenance should be equitably distributed among both the servient tenants and dominant tenant because their use is mutual ")

[245 P.3d 935]*Marsh v Pullen*, 50 Or App 405, 623 P 2d 1078, 1080 (1981) (remanding to apportion the costs of maintaining the easement), *Hayes v Tompkins* 287 S C 289, 337 S E 2d 888, 891 (1985) (considering the burden, benefit, and use of the easement in apportioning maintenance and repair costs); *Hart v Hart*, 27 Va App 46, 497 S E 2d 496, 502 (1998) (apportioning the costs of maintaining and repairing easements between the parties to a divorce) [12]

¶ 21 Additionally, in the case of multiple dominant easement owners, such owners may be required to share in the cost to repair and maintain an easement even absent language requiring such in the conveyance or an express agreement *See, e g , Island Improvement Ass'n*, 383 A 2d at 134-35 (finding " compelling equitable reasons" to " declar[e] the obligation of all the individual owners to contribute to the repair and maintenance of the easement in question")

¶ 22 Many courts recognizing the obligation of contribution have concluded that contribution should be based on each party's proportionate use of the easement *See Barnard*, 361 P 2d at 781, *Lakeland Property Owners Ass'n*, 77 Ill Dec 68, 459 N E 2d at 1170, *Bina* 239 N W at 71, *Marvin E Nieberg Real Estate Co* , 867 S W 2d at 623, *Cohen*, 642 N Y S 2d at 800, *Marsh*, 623 P 2d at 1080, *Hart*, 497 S E 2d at 502 Other courts have indicated that contribution should be based on an " equitable" apportionment that might consider various factors, including use and benefit *See generally Larabee*, 463 N E 2d at 492 (citing with approval cases supporting a proportionate use analysis and cases supporting an equitable division), *Drolsum*, 611 A 2d at 125, *Lindhorst*, 616 P 2d at 454-55, *Hayes*, 337 S E 2d at 891

¶ 23 Further, a defendant should receive notice and a reasonable opportunity to participate in decisions regarding repairs and maintenance before liability attaches *See Quinlan v Stouffe* 355 Ill App 3d 830, 291 Ill Dec 305, 823 N.E 2d 597 606 (2005), *Cohen*, 642 N Y S 2d at 800 Also, the duty to pay should be imposed only for necessary and reasonable maintenance and repairs *see Quinlan*, 291 Ill Dec 305, 823 N E 2d at 606, *Lakeland Property Owners Ass'n*, 77 Ill Dec 68, 459 N E 2d at 1170,[13] performed adequately and properly and at a reasonable price *See Cohen* 642 N Y S 2d at 800

¶ 24 Applying the foregoing principles to this case, we conclude that, absent the creation of a duty expressly in the conveyance document or by other contract, the doctrine of equitable contribution should be extended to permit one dominant tenant to require another dominant tenant to contribute to the necessary repair and maintenance of an easement if both tenants are using the easement Consequently, the Freemans and Sorchych have a shared obligation for the necessary maintenance and repair of the roadway easement even absent language in the conveyance imposing such an obligation and even absent a cost-sharing agreement between the parties Our decision does not, however mandate an equal or " fifty/fifty" sharing agreement Instead, each party's contribution should be based on an equitable apportionment determined after consideration of various relevant factors, which may include but are not limited to each party's proportionate use of the easement, including the amount and intensity of actual use, and the benefits derived therefrom[14], whether each party received proper notice and a reasonable opportunity to participate in the decisions regarding repairs

and maintenance, whether the completed work was reasonable **[245 P.3d 936]** and necessary, whether the repairs and maintenance were performed adequately, properly, and at a reasonable price, the value of any other contributions (monetary or in kind) by the parties to repairs and maintenance, and any other factors that may be deemed relevant [15] *See generally Healy v Onstott*, 192 Cal App 3d 612, 617, 237 Cal Rptr 540 (1987) (stating that " the trier of fact must be allowed to fashion any reasonable contribution scheme") We therefore vacate that portion of the judgment denying the Freemans' claim for contribution and remand for a determination of the parties' equitable apportionment

¶ 25 Sorchych argues that our adoption of the approach advocated by the Restatement (Third) might invite lawsuits among neighbors, in part because only a generalized standard for contribution will exist, and it should be the legislature's burden to address this issue Although the issue of contribution has been addressed legislatively in some states, *see* Cal Civ Code § 845 (West 2007) (requiring that owners of an easement share costs of maintenance and repair), Ga Code Ann § 44-9-45 (West 2010) (providing that a condemnor or successors in title must maintain a private way or else it shall be deemed abandoned), it has largely remained the province of the courts Certainly, if our legislature wishes to address this issue, it has the ability to do so At the same time, however, we are not precluded from addressing the issue of contribution, and we conclude that our decision is sound policy because it will help to ensure that dominant landowners pay their equitable share for the use of jointly held property and may promote agreements among neighbors as a prospective method of avoiding disputes and litigation, thereby creating more certainty for landowners, real estate agents, and prospective buyers as to their rights and obligations Nothing in this opinion, however, should be construed as expanding the rights of a dominant tenement with regard to its permitted use of an easement *See Thurston Enters*, 519 A 2d at 302 Further, our holding adopting the doctrine of equitable contribution in this case should not be construed as addressing, much less expanding, tort liability among landowners *See generally Borgel*, 280 A 2d at 609-10

II Unjust Enrichment

¶ 26 The Freemans also argue that the trial court erred in denying their claim for unjust enrichment We find no abuse of the trial court's discretion

¶ 27 To recover under a theory of unjust enrichment, a plaintiff must demonstrate five elements (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment and (5) the absence of a remedy provided by law *City of Sierra Vista v Cochise Enters, Inc* 144 Ariz 375 381-82, 697 P 2d 1125, 1131-32 (App 1984) (citing *A & A Metal Bldgs v I-S, Inc*, 274 N W 2d 183 (N D 1978)) Thus a plaintiff must demonstrate that the defendant received a benefit, that by receipt of that benefit the defendant was unjustly enriched at the plaintiff's expense, and that the circumstances were such that in good conscience the defendant should provide compensation *See Murdock-Bryant Constr, Inc v Pearson*, 146 Ariz 48, 53, 703 P 2d 1197, 1202 (1985) (citing *Pyeatte v Pyeatte*, 135 Ariz 346, 352, 661 P 2d 196, 202 (App 1983)) " However the mere receipt of a benefit is insufficient" to entitle a plaintiff to compensation *Id* at 54, 703 P 2d at 1203 Instead, for an award based on unjust enrichment, a plaintiff must show " that it was not intended **[245 P.3d 937]** or expected that the services be rendered or the benefit conferred gratuitously, and that the benefit was not ' conferred officiously ' " *Id* (quoting *Pyeatte*, 135 Ariz at 353 661 P 2d at 203)

¶ 28 At trial, Mr Freeman testified, and the court found, that the Freemans would have spent exactly the same amount had Sorchych not owned property in the area, in other words, none of the expenditures contributed by the Freemans were made solely to benefit access to Sorchych's home Further, the Freemans presented no evidence that Sorchych's use of the roadway caused maintenance or repairs to be performed on a more regular basis Instead, Mr Freeman's testimony and the other evidence provided support the conclusion that the Freemans' expenditures were solely to maintain, repair, or improve the roadway for their own purposes, and any benefit to Sorchych was simply a by-product of their contribution [16] Accordingly, the Freemans did not demonstrate that having the roadwork performed at their request was done to their detriment Further, our decision regarding the first issue raised by the Freemans, contribution, ensures that there is no absence of an equitable remedy in this case

¶ 29 Given the facts presented in this case we conclude that the trial court did not abuse its discretion in concluding that the Freemans failed to establish the necessary elements for their unjust enrichment claim by showing that they expended funds to their detriment and for Sorchych's benefit

III The Trial Court's Award of Attorneys' Fees

¶ 30 After Sorchych filed a motion for reconsideration seeking attorneys' fees pursuant to Rule 77(f)(2), Ariz R Civ P, the trial court granted his motion and awarded attorneys' fees to him in the amount of $5,000 00 The Freemans argue that the trial court erred in granting Sorchych's request for attorneys' fees because, after they appealed the arbitrator's decision that denied all of their

claims, they obtained partial summary judgment against Sorchych for $2,162 18 on their tortious interference claim, and they maintain that judgment must be included in evaluating whether the judgment they obtained in the trial court was at least twenty-three percent more favorable to them than the judgment granted by the arbitration award [17] Sorchych asserts that because the case was ultimately split into two separate parts involving (1) the tortious interference with contract claim, and (2) the remaining equitable claims involving contribution and unjust enrichment, the separate judgments must be evaluated independently Because we vacate the judgment before us in part and remand for further proceedings, we also at this time vacate the trial court's award of attorneys' fees Consequently, we need not and do not address this issue

IV Costs and Attorneys' Fees on Appeal

¶ 31 Both sides request an award of costs and attorneys' fees on appeal We decline to award attorneys' fees to either side The Freemans fail to cite a basis for their attorneys' fees request, and Sorchych cites only Rule 21, ARCAP, which merely sets forth the procedure for requesting attorneys' fees and may not be cited as a substantive basis for an award of fees *See*

[245 P.3d 938] *Tilley v Delci*, 220 Ariz 233, 239, ¶ 19, 204 P.3d 1082, 1088 (App 2009) (citing *Smyser v City of Peoria*, 215 Ariz 428 442, ¶ 50, 160 P 3d 1186 1200 (App 2007)), *Country Mut Ins Co v Fonk* 198 Ariz 167, 172, ¶ 25, 7 P 3d 973, 978 (App 2000) (denying a request for attorneys' fees on appeal because the party failed to state any substantive basis for the request) Further, in light of our decision, this case is not over We do, however, award the Freemans their costs on appeal subject to compliance with Rule 21 *See Nangle v Farmers Ins Co of Ariz*, 205 Ariz 517, 523, ¶ 34, 73 P 3d 1252, 1258 (App 2003)

CONCLUSION

¶ 32 For the aforementioned reasons, we affirm in part and vacate in part the trial court's judgment in favor of Sorchych and remand for supplemental proceedings consistent with this decision

CONCURRING PATRICIA K NORRIS and PATRICK IRVINE, Judges

Notes

[1] Much of the roadway easement exists on land owned by neither the Freemans nor Sorchych, although a portion of the roadway utilized by both the Freemans and Sorchych exists on Sorchych's property The Freemans state, however, that neither they nor Sorchych own any of the underlying property upon which the portion of the easement that is the subject of the dispute is located

[2] Foster purchased the property in approximately 1980 and subsequently maintained the road himself, with assistance from a neighbor After he sold a portion of his property to the Freemans, Foster requested that they participate in the costs of maintenance and repairs, but Mr Freeman allegedly refused the request Mr Freeman has at least in part disputed that allegation, averring that he did contribute to the common portion of the road's maintenance in 1992

[3] Sorchych has contended that, soon after purchasing his portion of the Foster property, he had the roadway graded, and he rather than the Freemans bore the responsibility for maintaining and repairing the roadway-at least until the Freemans decided to build their home, move onto their property, and dramatically improve the road, ostensibly for the purposes of acquiring a building permit and providing access for construction and fire department equipment Sorchych further contended that, sometime during the three years before trial his wife and a contractor, Bill Payne, had performed maintenance and repairs on the shared portion of the road

[4] By the time of trial, the amount sought by the Freemans from Sorchych for road maintenance and repair was $21,657 16

[5] The case proceeded to arbitration, and in March 2006, the arbitrator found in favor of Sorchych with regard to all three counts and awarded Sorchych his court costs, but declined to award attorneys' fees pursuant to A R S § 12-349 On March 29, 2006, the Freemans appealed to the trial court from the arbitrator's decision

[6] Sorchych paid the amount owed on the judgment related to the tortious interference with contract claim, and that judgment is not a subject of this appeal

[7] The interpretation of an easement is generally a matter of law *See Powell v Washburn*, 211 Ariz 553, 555, ¶ 8, 125 P 3d 373, 375 (2006), *Squaw Peak Cmty Covenant Church of Phoenix v Anozira Dev, Inc*, 149 Ariz 409, 412, 719 P 2d 295, 298 (App 1986) As noted, the document conveying the easement grants " an easement for existing roadway as it exists on October 2, 1969 " The easement does not clarify whether its language should simply be interpreted as referring to the existing pathway or configuration (i e , location) of the road in 1969 or as perhaps also referring to the condition or quality of the road in 1969 Further the easement provides no express description of the condition or quality of the road, and it also contains no express language specifically imposing an

obligation to repair or maintain the roadway in the condition that it was in as of October 2, 1969. The Freemans nonetheless contend that the easement's aforementioned language impliedly imposes such an obligation upon the successors in interest to the easement. Our supreme court has recently adopted the approach of the Restatement (Third) of Property: Servitudes (" Restatement (Third)"), which provides that " [a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *See Powell*, 211 Ariz. at 554, 556-57, ¶ ¶ 1, 13-14, 125 P.3d at 374, 376-77 (quoting Restatement (Third) § 4.1(1) (2000)). Thus, to the extent possible, parties should present evidence regarding, and a trial court should attempt to ascertain, the original intent of the parties to an easement.

We also note that although the Freemans contend " the evidence is undisputed that the condition of the roadway in 1969 was better than it is today" because they presented a witness who testified as to the road's condition in 1969, such testimony must be evaluated in light of any other evidence tending to indicate the road's previous condition. *See generally Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995) (stating that the role of weighing the evidence and determining the credibility of witnesses is the role of the trial court). Given that Sorchych presented probative evidence that could be interpreted as controverting the testimony presented by the Freemans and creating a question of fact as to the roadway's previous condition, and given that the trial court ruled at the conclusion of the Freemans' case-in-chief and therefore at least some of Sorchych's evidence was apparently not presented or considered by the trial court, to the extent it is relevant a factual question still exists as to the previous condition of the road in 1969 and subsequently.

[8] The court further noted that the Freemans' request for contribution " is made even though [the Freemans] acknowledge that [Sorchych] never agreed to contribute, despite the fact this issue was discussed by the parties." The Freemans argue that the testimony at trial was that Sorchych did in fact agree to contribute and therefore, the court erred in its finding. We find no clear error in the trial court's characterization of the Freemans' testimony. *See Farmers Ins. Co. v. Young*, 195 Ariz. 22, 28, ¶ 19, 985 P.2d 507, 513 (App. 1998).

Mr. Freeman testified that, in approximately 2000, before Sorchych purchased his property, he had a conversation with Sorchych, in which Sorchych " agreed to help" with roadway maintenance. Mrs. Freeman also testified that, sometime after Sorchych purchased his property, " probably in the Spring of 2002," she had a casual discussion " over the back fence" with Sorchych about " neighbor stuff," including the road's deterioration in the previous four or five years, and he agreed to " participate" in bringing the road back up to the standard before that alleged deterioration. She could not remember, however, if she had used the term " expense" in the conversation. Also, Mr. Freeman further testified that later in 2002, when the Freemans chose to begin work on the road, Sorchych indicated he would not contribute to maintenance because he preferred that the road be in a more " rustic" condition. Thus, a reasonable interpretation of the Freemans' testimony, as ostensibly found by the court and supported by the record, was that Sorchych had not agreed to contribute monetarily to maintenance or repair of the road, but that he initially offered to assist in maintaining the road, and he rescinded that offer in 2002, before the Freemans had substantially relied on any alleged agreement.

Moreover, consistent with the court's understanding of the Freemans' testimony, Sorchych asserted in his answer to the First Amended Complaint that he had not approved or agreed to contribute payment for the roadway's maintenance and repair, but that he had offered his efforts and the reasonable use of his tractor for such maintenance and repair. Additionally, in his testimony at trial, Sorchych denied discussing the topic of contributing monetarily to maintenance with the Freemans.

[9] *See also Seymour v. Harris Trust & Sav. Bank of Chicago*, 264 Ill. App. 3d 583, 201 Ill. Dec. 553, 636 N.E.2d 985, 994 (1994) (stating that, in the absence of an agreement to the contrary, the owner of an easement has not only the right but the sole duty to keep the easement in repair); *Lynch v. Keck*, 147 Ind. App. 570, 263 N.E.2d 176, 183 (1970) (holding that owners of a dominant estate had a duty to keep the easement in a proper state of repair to avoid damaging the servient estate through erosion); *Island Improvement Ass'n of Upper Greenwood Lake v. Ford*, 155 N.J. Super. 571, 383 A.2d 133, 134-35 (1978) (holding that individual property owners holding an express easement to use roads in a privately developed residential area, rather than the voluntary non-profit association organized to raise funds to maintain the roads, were obligated to contribute to the repair and maintenance of those roads); *Ingling v. Pub. Serv. Elec. & Gas Co.*, 10 N.J. Super. 1, 76 A.2d 76, 81 (1950) (holding that the dominant tenement, a power company, rather than the servient tenement, had affirmative duties of inspection and repair related to its easement); *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593, 598 (1982) (same); *Meadow Run & Mountain Lake Park Ass'n v. Berkel*, 409 Pa. Super. 637, 598 A.2d 1024, 1027 (1991) (holding that repair and maintenance costs for common roads and other common areas were the responsibility of the residential users and not the homeowners' association that held title to the roads); *Carson v. Jackson Land & Mining Co.*, 90 W. Va. 781, 111 S.E. 846, 848 (1922) (holding that the duty to maintain an

easement was upon those entitled to its use rather than upon the servient estate) *Cf Papa v Flake* 18 Ariz App 496, 498, 503 P 2d 972, 974 (1972) (not relying on the Restatement (First) but recognizing that a dominant easement owner, using due care to not needlessly increase the burden of a servient estate, has the right to enter that servient estate at reasonable times to effect necessary repairs and maintenance)

[10] Comment (e) to § 4.13 of the Restatement (Third), entitled " *Maintenance and repair obligations among holders of separate easements, subsection (4).* " further explains in part as follows

The holders of separate easement rights to use the same improvements are obligated to contribute to the reasonable costs of repair and maintenance of the portion of the servient estate or the improvements used in enjoyment of the servitude The rule stated in this section governs the relationship among the servitude beneficiaries [O]nce repair or maintenance is reasonably undertaken by one or more of the servitude beneficiaries, the others have a duty to contribute to the reasonable costs The responsibility of each user should reflect a fair proportion of the costs The basis of fair apportionment will vary depending on the circumstances Factors that may be relevant include the amount and intensity of actual use and the value of other contributions made by the users to improvement and maintenance of the easement or profit

[11] This court has previously relied on § 4 13 of the Restatement (Third) *See Strawberry Water Co v Paulson,* 220 Ariz 401, 409, ¶ 20, 207 P 3d 654, 662 (App 2008) (recognizing that the dominant easement owner, not the servient estate owner, bears responsibility for maintaining an easement) (review denied Apr 20, 2009)

[12] *But see Borgel v Hoffman,* 219 Pa Super 260, 280 A 2d 608, 610 (1971) (declining to impose a sharing rule among easement users who were both dominant and servient tenants of the same easement in a tort case in which the plaintiff fell on that portion of the easement located on the defendant's property and the defendant sought to join as additional defendants other dominant tenants sharing that easement)

[13] *Cf Thurston Enters., Inc v Baldi,* 128 N H 760, 519 A.2d 297, 302 (1986) (recognizing that " the owner of an easement cannot materially increase the burden of it upon the servient estate" (quoting *Crocker v Canaan Coll.,* 110 N H 384, 268 A 2d 844, 847 (1970)))

[14] Obviously, in some cases, a party's use may be sporadic or vary depending on the time of the year Also, for example, a private individual's use might be much less than that of a large family with many visitors or someone with an on-site business that draws a large number of customers

[15] As Sorchych notes, " [t]he parties in this case have entirely different views as to what is appropriate or necessary maintenance and repair " Of course, the previous condition of the roadway easement, the necessity of the work to meet any previously established minimum standards for the roadway's condition, whether by ostensibly allowing the road to fall into a state of disrepair the parties or their predecessors waived or " abandoned" any rights (and concomitant obligations) or established new standards with regard to the road, whether the work really constituted improvements rather than maintenance and repairs the nature and extent of the work performed, the purpose(s) of the funds expended by the Freemans, whether the parties are subject to the same regulations, and whether any equitable offset exists for the value of maintenance and repair work performed or otherwise contributed by Sorchych are contested issues of fact in this case that may need to be addressed in apportioning repair and maintenance costs

[16] The testimony also created a question of fact as to the extent to which Sorchych received a benefit. Mr. Freeman testified that, to his knowledge, all of Sorchych's vehicles were four-wheel drive, and that not only did Sorchych refuse to contribute monetarily to the roadwork because he purportedly " liked the road rustic," but he actually " made a pest of himself" by consistently complaining about the roadwork being conducted at the Freemans' direction Sorchych testified that it was his intent to keep the roadway " primitive" to reduce third-party travel on the road, and that, when necessary, he would use his tractor or hire a third party at his expense " to maintain passability, which is all I cared about " He further testified that, from the onset, he disagreed with the Freemans regarding the necessity of much of the roadway work completed at the Freemans' direction and that he believed " the road is not as safe" due to the changes made

[17] *See* Ariz R Civ P 77(f), *see also Farmers Ins Co v Tullsalt* 192 Ariz 129, 130, ¶ 8, 962 P 2d 203, 204 (1998) (" [I]n order for the appellant of an arbitration award of $0 to avoid paying the appellee's attorneys' fees, the appellant must obtain a judgment of more than $0 ")

Appendix C

361 N.Y.S.2d 613

79 Misc.2d 941

Frances B. JANES, Plaintiff,

v.

Gene POLITIS, Defendant.

Supreme Court, Rockland County.

Dec. 5, 1974.

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Johnson & Johnson, Nyack, for plaintiff

Morton Pinkus, New City, for defendant

EDWARD M. O'GORMAN, Justice

The plaintiff and the defendant are the owners of adjoining lots. These lots were originally the **[79 Misc.2d 942]** property of a common grantor, who constructed two dwelling houses thereon. The sewage disposal facilities of both dwellings were connected to one septic tank and its surrounding filter bed.

In the process of subdividing the property, the original grantor conveyed plaintiff's parcel subject to an easement for the benefit of the second dwelling to permit the sewage from that dwelling to continue to flow through plaintiff's parcel to the septic tank which was located thereon. The defendant, by the acquisition of her parcel, has succeeded to the right to continue the flow of sewage from her dwelling through plaintiff's parcel into the septic tank located thereon.

With the passage of time, the use of this sewage disposal system has resulted in a saturation of the plaintiff's property by the tank effluent, which also resulted in a seepage therefrom into the public highway. The plaintiff has from time to time expended monies in the cleaning of the septic tank, and also has paid a substantial amount for improvement in the replacement and rebuilding of the filter bed on

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her property in order to take care of the overflowing effluent and in order to comply with orders of the village health department.

The evidence in this case establishes generally that the septic tank system became overburdened during intervals during which the defendant's dwelling house was rented to tenants. The system seemed adequate at other times to handle the requirements of the plaintiff, who is a widow living alone, and the defendant.

The plaintiff brings this action in an effort to obtain a contribution from the defendant to the cost of the repair and maintenance of the sewage disposal system, and also for a declaratory judgment declaring the rights and duties of the parties in connection therewith in the future.

It is defendant's contention that she is not liable to make any contribution because no such duty is imposed upon her by the terms of the easement, and because she has *not requested* nor consented to any maintenance or repair expense which may have been incurred by the plaintiff.

With respect to the duty to make repairs for the enjoyment of an easement, the general rule is that, apart from contract, the easement imposes upon the servient tenement no obligation other than the passive duty of submitting to use by the dominant owner. In the absence of an agreement to the contrary, the burden of the maintenance and repair of an easement falls upon the dominant owner. The dominant owner,

[79 Misc.2d 943] however, is under no duty to make improvements or repairs for the benefit of the servient owner (17 N.Y.Jur. 154).

With respect to easements in common however, the general rule is that the burden of maintaining an easement owned in common and used by the co-owners is imposed upon all of them.

The parties in this case, while having a relationship to each other of dominant and servient tenements as far as the language in the conveyances is concerned, also have many of the attributes of parties sharing an easement in common, inasmuch as both parties use the septic tank on plaintiff's premises as their sewage disposal facility. Should the court hold that the defendant is not liable in this case to make any contribution to the cost of maintenance of the septic tank system on the plaintiff's property, an intolerable situation would result. Under such circumstances, the plaintiff must either meet the total expense of the maintenance of the joint system, or undergo the ordeal of contending with a noxious effluent on her front lawn, and subject herself to punishment by the village authorities for a violation of the health code. In this situation, even should she terminate her use of the septic tank facilities, she could not prevent its

continuing overflow nor avoid its adverse consequences

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That the court in deciding this case may consider a determination which will avoid such an inequitable state of affairs is not without precedent In People v Wittman, 205 Misc 1046, 131 N Y.S 2d 825, a common grantor created a common driveway in the rear of properties which were conveyed to several individual grantees Each of the grantees had a right of way across the rear of the property of the neighboring grantees to gain access to the street Because of the grade conditions, a retaining wall was necessary on the premises of the lot owner at the end of the driveway This wall having fallen into disrepair in violation of the City Administrative Code, all of the owners were prosecuted for their failure to maintain the wall, although the wall was located solely on the property of one of them The remaining property owners contended that there was no obligation on their part to maintain any portion of their easement which was not on their own properties Judge Shapiro, sitting at the time as a court of special sessions, stated:

'Assuming, Arguendo, that the wall in question is wholly upon the property of the defendant Wittman, and that by reason thereof the obligation to repair it falls upon her alone, it might well be that **[79 Misc.2d 944]** the cost of repairing this defective and dangerous retaining wall would be so prohibitive as to induce her to legally abandon the easement and use of her garage, fill in the rear of the property to the grade of Hoover Avenue and thus unilaterally create a situation whereby her neighbor immediately to the west would incur the entire obligation to provide a retaining wall since such neighbor would then be maintaining the grade of his lot below the legal grade. Each neighbor could then in turn follow Wittman's example and pass the obligation along to the neighbor immediately to the west of him up to the owner of the end lot at 150th Street'

The court pointed out that this example demonstrated that there is a mutual obligation upon adjoining co-owners in a situation of this kind The same reasoning applies to this case

The Wittman case, supra, involved a violation of the Administrative Code of the City of New York, and the court pointed out that each of the defendants, but for the retaining wall, would be maintaining his property not at grade, in violation of the code Under those circumstances the court held that the obligation to maintain the retaining wall is the mutual obligation of all those who would be occupying their property in violation of law if there were no retaining wall So too, in the instant case, if the septic tank is permitted to overflow from plaintiff's land to the public highway, both the sewage disposal systems of the plaintiff and the defendant are in violation of the health laws of the village, and therefore it should be their mutual obligation to see that this does not continue.

In view of the foregoing, in this situation which involves the dual relationship of the plaintiff and defendant as owners of the dominant

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and servient tenements on the one hand, and as users of a common facility on the other, this court, in the interest of fairness and practicality, should adopt these consequences which would normally flow from the use of an easement in common The court finds that the duty to maintain and repair the common septic tank system used by the plaintiff and the defendant in this case should be borne equally between them, and that the defendant will be liable to the plaintiff for her equitable share of those expenses

I do not find anything in the proof concerning either the amount of the expenditures to date, the necessity for the expenditures, or the adequacy of notice to the defendant, which would defeat plaintiff's right to be reimbursed the sum of $476 64, as reimbursement for one-half the amount of the **[79 Misc.2d 945]** expenditures, and the court further declares that the obligation in the future to repair and maintain said sewage disposal system shall be borne equally by the plaintiff and the defendant as owners of their respective parcels of land

Appendix D

50 Or.App. 405 (Or.App. 1981)

623 P.2d 1078

Floyd William MARSH, Sr., Donna Marsh and William Harley

Marsh, Appellants,

v.

Wesley PULLEN, Respondent.

No. 15389; CA 17097.

Court of Appeals of Oregon.

February 17, 1981

Argued and Submitted Nov. 17, 1980

Reconsideration Denied March 26, 1981

Review Denied April 21, 1981

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John R. Faust, Jr., argued the cause for appellant. On the briefs were Katherine O'Neil, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Thomas C. Peachey, The Dalles argued the cause for respondent. With him on the brief was Lewis, Foster & Peachey, The Dalles.

Before JOSEPH, P. J., and WARDEN and WARREN, JJ.

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[623 P.2d 1079] JOSEPH, Presiding Judge.

This is a suit brought by the owners of an easement to enjoin alleged obstruction of the easement by defendant, the servient owner. The trial court entered a decree granting a partial injunction, but denied other injunctive relief. Plaintiffs appeal and seek a modification of the decree to prohibit all the alleged interferences with the easement.

Plaintiffs' farm property known as the Marsh Home Place. Defendant operates a mobile home park on adjacent land in an area called Foley Lakes Property. In 1912, as part of the settlement of the estate of Abel Marsh, the Marsh Home Place was severed from the Foley Lakes Property. At the same time, an express easement was created traversing the Foley Lakes Property to provide access to plaintiffs' farm. The easement was described as follows:

"It is further understood and agreed that said purchaser shall continue to permit the roadway or gateway heretofore used by deceased and his family and the public to remain and to be used as heretofore upon and across the said premises furnishing a means of ingress and egress to and from the main County Road to the Marsh *Home Place, until* and unless the same shall be changed or vacated in the manner provided by law * * *."

At the time the easement was created, both parcels of land were being farmed. Since the early 1950's defendant and his predecessors have operated the mobile home park.

Plaintiffs allege that defendant has wrongfully obstructed the easement by constructing speed bumps on the roadway, by permitting a cedar hedge to grow too close to the easement and by parking or permitting his tenants to park on the easement. [1] Plaintiffs also seek to have imposed on defendant responsibility for a pro rata share of the expenses for repair and maintenance of the easement. The trial court entered a decree permitting defendant to maintain a reasonable number of speed bumps, not to exceed seven inches in height, but denied all other injunctive relief.

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In an effort to reduce speeding by tenants of the trailer court defendant installed speed bumps in the easement. Plaintiffs claim that speed bumps unreasonably interfere with their own use of the easement and that they reduce the scope of the easement below that intended by the original grant.

The reservation of the easement provides in general terms only for "a means of ingress and egress to *and from* the main County Road to the Marsh Home Place." The extent of the easement is not further specifically defined. In *Fendall v. Miller*, 99 Or. 610, 615, 196 P. 381 (1921), the court stated that where an easement is not specifically defined "the rule is that it need be only such as is reasonably necessary and convenient for the purpose for which it was created." In *Van Natta v. Nys and Erickson*, 203 Or. 204, 278 P.2d 163 (1955), the court adopted the following rule for evaluating the use of an easement by the servient owner:

"If, in view of all the attendant circumstances the use to which the servient tenement proposes to subject the road is a reasonable one, will not destroy the road and will not

deprive the easement owner of the degree of use to which he is entitled, an injunction will not issue against him " 203 Or at 231, 278 P 2d 163

Speed bumps are a reasonable means to control the speeding problem on the easement There was evidence that at a height of eight to ten inches, the speed bumps caused some passenger cars to scrape bottom, and the plaintiffs testified to a concern that loads of stock or hay would shift when crossing such severe bumps (although there was no evidence of any actual damage) We conclude that if limited to a height of seven inches they will not unreasonably interfere with plaintiffs' use of the **[623 P.2d 1080]** easement The decree should also provide that the bumps not be spaced more closely than 200 feet apart and that they be placed only in the road adjacent to the areas actually used for the mobile home park

Secondly, plaintiff argues that the trial court erred in not ordering the removal of a cedar hedge growing along the easement Plaintiffs claim that the hedge blocks the line of sight required to make entry onto the county road

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from the easement safe The trial court refused to order the removal of the hedge, because there was no evidence that it was physically growing on or was a part of the easement Plaintiffs concede that there is no evidence of a physical encroachment on the easement, but they urge that a balancing of the hardship to defendant and the relative benefit to plaintiffs require the removal of the hedge They cite *Tauscher v Andruss*, 240 Or 304, 401 P 2d 40 (1965), but that reliance is misplaced In that case the easement owner established that there had been an encroachment, and the court concluded that he was entitled to a mandatory injunction ordering its removal unless it would be inequitable There has been no showing of an encroachment here, so we do not reach the matter of balancing

Plaintiffs also claim that the trial court erred in not enjoining parking along the easement The record reveals at least two instances when the easement was blocked to traffic because of parked cars, and on several occasions plaintiffs or their guests had to maneuver around parked cars to travel down the road or had to request that certain cars be moved to permit passage along the road

Plaintiffs are entitled to use the easement as a means of ingress and egress without substantial interference Parked cars on the easement do interfere with their free and unrestricted use of the easement and deprive plaintiffs of a degree of use to which they are entitled by the original grant of the easement Van Natta v Nys and Erickson, supra, see *Landauer v Steelman*, 275 Or 135, 549 P 2d 1256 (1976) The decree shall be modified to prohibit any parking that would interfere with use of the regularly traveled part of the easement

Finally, plaintiffs claim that the court erred in not declaring that they have a right to maintain the easement and to require a proportionate contribution from defendant for costs of repair and maintenance Defendant agrees that where both the servient owner and the easement owner use the easement and restoration or maintenance is required contribution by the servient owner for the costs of repairs and maintenance is allowed Van Natta v Nys and Erickson, supra Defendant claims, however, that plaintiffs failed to introduce any evidence that would afford the court

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an adequate basis for determining an apportionment of the expenses and that, therefore, computing defendant's pro rata share is not possible

In Van Natta, there was evidence that could have been used for computing the cost of restoring the road, but there was no basis for segregating the damage which each party inflicted The case was remanded for entry of a decree for cost apportionment, with further testimony to be taken if required In this case the record contains evidence that could be used to apportion the cost of maintaining the easement based on the relative approximate use by the easement owner and the servient owner, but, as in Van Natta, it is insufficient fairly to apportion costs Therefore, we will remand for entry of a decree apportioning costs after further proceedings

Affirmed in part, reversed in part, and remanded with instructions

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Notes

[1] Plaintiffs made other allegations in their amended complaint, but those allegations were moot by the time of trial

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Appendix E

109 S.Ct. 2180
Supreme Court of the United States

John W. MARTIN, et al., Petitioners,
v.
Robert K. WILKS et al.
PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, et al., Petitioners
v.
Robert K. WILKS et al.
Richard ARRINGTON, Jr., et al., Petitioners
v.
Robert K. WILKS et al.

Nos. 87-1614, 87-1639 and 87-1668.
|
Argued Jan. 18, 1989.
|
Decided June 12, 1989.
|
Rehearings Denied Aug. 11, 1989.
|
See 492 U.S. 932, 110 S.Ct. 11.

White fire fighters brought suit alleging that they were being denied promotions in favor of less qualified blacks. The United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., Chief Judge, granted defendants' motion to dismiss. On appeal, the United States Court of Appeals for the Eleventh Circuit, 833 F.2d 1492, reversed, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that white fire fighters, who had failed to intervene in earlier employment discrimination proceedings in which consent decrees were entered, could challenge employment decisions taken pursuant to those decrees.

Affirmed.

Justice Stevens filed dissenting opinion in which Justices Brennan, Marshall and Blackmun joined.

West Headnotes (3)

[1] **Judgment**
- Persons Not Parties or Privies

One is not bound by a judgment in personam in litigation in which he is not designated as party or to which he has not been made a party by service of process.

100 Cases that cite this headnote

[2] **Judgment**
- Nature of Action or Other Proceeding

Judgment
- Persons Not Parties or Privies

Where special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if scheme is otherwise consistent with due process. U.S.C.A. Const.Amends. 5, 14.

128 Cases that cite this headnote

[3] **Judgment**
- Judgment by Confession or on Consent or Offer

Judgment
- Persons Not Parties or Privies

White fire fighters, who had failed to timely intervene in earlier employment discrimination proceedings in which consent decrees were entered, were not precluded from challenging employment decisions taken pursuant to those decrees on theory that their reverse discrimination actions constituted an impermissible collateral attack on the consent decrees; the linchpin of the "impermissible collateral attack" doctrine-the attribution of preclusive effect to a failure to intervene-is inconsistent with Federal Rules of Civil Procedure. Fed.Rules Civ.Proc.Rules 19(a, b), 24, 28 U.S.C.A.

252 Cases that cite this headnote

**2181 *Syllabus*

*755 Black individuals and a branch of the National Association for the Advancement of Colored People brought actions in Federal District Court against the city of Birmingham, Alabama, and the Jefferson County Personnel Board (Board), alleging that the defendants had engaged in racially discriminatory hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964 and other federal law. Consent decrees were eventually entered that included goals for hiring blacks as firefighters and for promoting them. Respondent white firefighters subsequently brought suit in the District Court against the city and the Board, alleging that, because of their race, they were being denied promotions in favor of less qualified blacks in violation of federal law. They argued that the city and the Board were making promotion decisions on the basis of race in reliance on the consent decrees, and that those decisions constituted impermissible racial discrimination. After trial, the District Court granted the defendants' motion to dismiss. It held that respondents were precluded from challenging employment decisions taken pursuant to the consent decrees, even though they had not been parties to the proceedings in which the decrees were entered. The Court of Appeals reversed, rejecting the "impermissible collateral attack" doctrine that immunizes parties to a consent decree from discrimination charges by nonparties for actions taken pursuant to the decree.

Held: Respondents are not precluded from challenging the employment decisions taken pursuant to the consent decrees. Pp. 2184-2188.

(a) "[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). P. 2184.

(b) Under ordinary application of the Federal Rules of Civil Procedure, a party **2182 seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. Rule 24, governing intervention, is cast in permissive terms. Rule 19(a) provides for mandatory *756 joinder in circumstances where a judgment rendered in the absence of a person may "leave ... persons already parties subject to a substantial risk of incurring ... inconsistent allegations," and Rule 19(b) sets forth the factors to be considered by a court in deciding whether to allow an action to proceed in the absence of an interested party. Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The linchpin of the "impermissible collateral attack" doctrine-the attribution of preclusive effect to a failure to intervene-is inconsistent with Rules 19 and 24. Pp. 2185-2186

(c) Neither *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968), nor *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), is authority for precluding respondents from challenging the actions taken under the consent decrees. Pp. 2186-2187.

(d) Even if there were some merit to the argument that the need to join affected parties would be burdensome and ultimately discouraging to civil rights litigation, acceptance of that argument would require a rewriting rather than an interpretation of the relevant Federal Rules. In any event, the difficulties in identifying those who would be adversely affected by a decree arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder. Plaintiffs who seek the aid of courts to alter employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail. The alternative urged here does not eliminate the need for, or difficulty of, identifying persons who should be included in a lawsuit. It merely shifts that responsibility to less able shoulders. The system of joinder called for by the Federal Rules is not likely to produce more relitigation of issues than a converse rule, and best serves the interests involved in the run of litigated cases, including cases like the present ones. Pp. 2187-2188.

(e) With respect to the argument that the congressional policy favoring voluntary settlement of employment discrimination claims supports the "impermissible collateral attack" doctrine, it is essential to note what is meant by a "voluntary settlement." A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement. Insofar as it may be easier to settle claims among a disparate group of affected persons if they are all before the court, joinder accomplishes *757 that result as well as would a regime of mandatory intervention. P. 2188.

833 F.2d 1492 (CA 11 1987), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 2188.

Attorneys and Law Firms

James P. Alexander argued the cause for petitioners in Nos. 87-1639 and 87-1668. With him on the briefs for petitioners in No. 87-1668 were *Robert K. Spotswood, Richard H. Walston, Michael R. Pennington,* and *James K. Baker. Frank M. Young III* and *James C. Huckaby, Jr.*, filed a brief for petitioners in No. 87-1639. *Robert D. Joffee* argued the cause for petitioners in No. 87-1614. With him on the briefs were *Thomas D. Barr, Robert F. Mullen, Paul C. Saunders, Alden L. Atkins, William L. Robinson, Richard T. Seymour, Stephen L. Spitz,* and *Susan W. Reeves.*

Raymond P. Fitzpatrick, Jr., argued the cause for respondents Wilks et al. With him on the brief was *Courtney H. Mason, Jr.* *Deputy Solicitor General Merrill* argued the cause for the United States. On the brief were *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Michael R. Lazerwitz,* and *Dennis J. Dimsey.*†

† Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *James M. Shannon,* Attorney General of Massachusetts, *Alice Daniel,* Deputy Attorney General, and *Jane S. Schacter* and *Peter Sacks,* Assistant Attorneys General, *Don Siegelman,* Attorney General of Alabama, *John Steven Clark,* Attorney General of Arkansas, *John Van de Kamp,* Attorney General of California, *Joseph I. Lieberman,* Attorney General of Connecticut, *Frederick D. Cooke,* Corporation Counsel of the District of Columbia, *Robert A. Butterworth,* Attorney General of Florida, *Michael J. Bowers,* Attorney General of Georgia, *Jim Jones,* Attorney General of Idaho, *Linley E. Pearson,* Attorney General of Indiana, *Thomas J. Miller,* Attorney General of Iowa, *Robert T. Stephan,* Attorney General of Kansas, *Frederic J. Cowan,* Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William L. Webster,* Attorney General of Missouri *Mike Greely,* Attorney General of Montana, *Robert M. Spire,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *Stephen E. Merrill,* Attorney General of New Hampshire, *Cary Edwards,* Attorney General of New Jersey, *Robert Abrams,* Attorney General of New York, *Anthony J. Celebrezze Jr.*, Attorney General of Ohio, *Robert H. Henry,* Attorney General of Oklahoma, *James E. O'Neil,* Attorney General of Rhode Island, *T. Travis Medlock,* Attorney General of South Carolina, *Jim Mattox,* Attorney General of Texas, *Jeffrey Amestoy,* Attorney General of Vermont, *Mary Sue Terry,* Attorney General of Virginia, *Godfrey R. de Castro,* Attorney General of the Virgin Islands, *Charlie Brown,* Attorney General of West Virginia, *Donald J. Hanaway,* Attorney General of Wisconsin, and *Joseph B. Meyer,* Attorney General of Wyoming, for the American Civil Liberties Union et al. by *Steven R. Shapiro, John A. Powell, Michael J. Wahoske, Mark B. Rotenberg,* and *Leslie J. Anderson;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* and for the National League of Cities et al. by *Benna Ruth Solomon, Beate Bloch,* and *Zachary D. Fasman.*

Briefs of *amici curiae* urging affirmance were filed for the International Association of Fire Fighters, AFL-CIO, by *Thomas A. Woodley* and *Michael S. Wolly;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso.*

N. Thompson Powers, Ronald S. Cooper, Barry L. Goldstein, Julius LeVonne Chambers, and *Ronald L. Ellis* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae.*

Opinion

***758** ****2183** Chief Justice REHNQUIST delivered the opinion of the Court.

A group of white firefighters sued the city of Birmingham, Alabama (City), and the Jefferson County Personnel Board (Board) alleging that they were being denied promotions in favor of less qualified black firefighters. They claimed that the City and the Board were making promotion decisions on the basis of race in reliance on certain consent decrees, and that these decisions constituted impermissible racial discrimination in violation of the Constitution and federal statutes. The District Court held that the white firefighters were precluded from challenging employment decisions taken pursuant to the decrees, even though these firefighters had not been parties to the proceedings in which the decrees were ***759** entered. We think this holding contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party.

The litigation in which the consent decrees were entered began in 1974, when the Ensley Branch of the National Association for the Advancement of Colored People and seven black individuals filed separate class-action complaints against the City and the Board. They alleged that both had engaged in racially discriminatory hiring and promotion practices in various public service jobs in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other federal law. After a bench trial on some issues, but before judgment, the parties entered into two consent decrees, one between the black individuals and the City and the other between them and the Board. These proposed decrees set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters. The decrees also provided for goals for promotion of blacks within the fire department.

The District Court entered an order provisionally approving the decrees and directing publication of notice of the upcoming fairness hearings. App. 694-696. Notice of the hearings, with a reference to the general nature of the decrees, was published in two local newspapers. At that hearing, the Birmingham Firefighters Association (BFA) appeared and filed objections as *amicus curiae*. After the hearing, but before final approval of the decrees, the BFA and two of its members also moved to intervene on the ground that the decrees would adversely affect their rights. The District Court denied the motions as untimely and approved the decrees. *United States v. Jefferson County*, 28 FEP Cases 1834 (ND Ala. 1981). Seven white firefighters, all members of the BFA, then filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees. The seven argued that the decrees ***760** would operate to illegally discriminate against them; the District Court denied relief. App. to Pet. for Cert. 37a.

Both the denial of intervention and the denial of injunctive relief were affirmed on appeal. *United States v. Jefferson County*, 720 F.2d 1511 (CA11 1983). The District Court had not abused its discretion in refusing to let the BFA intervene, thought the Eleventh Circuit, in part because the firefighters could "institut[e] an independent Title VII suit, asserting specific violations of their rights." *Id.*, at 1518. And, for the same reason, petitioners had not adequately shown the potential for irreparable harm from the operation of the decrees necessary to obtain injunctive relief. *Id.*, at 1520.

A new group of white firefighters, the *Wilks* respondents, then brought suit against the City and the Board in District Court. They too alleged that, because of their race, they were being denied promotions in favor of less qualified blacks in violation of federal law. The Board and the City admitted to making race-conscious employment decisions, but argued that the decisions were unassailable because they were made pursuant to the consent decrees. A group of black individuals, the *Martin* petitioners, were allowed to intervene ****2184** in their individual capacities to defend the decrees.

The defendants moved to dismiss the reverse discrimination cases as impermissible collateral attacks on the consent decrees. The District Court denied the motions, ruling that the decrees would provide a defense to claims of discrimination for employment decisions "mandated" by the decrees, leaving the principal issue for trial whether the challenged promotions were indeed required by the decrees. App. 237-239, 250. After trial the District Court granted the motion to dismiss. App. to Pet. for Cert. 67a. The court concluded that "if in fact the City was required to [make promotions of blacks] by the consent decree, then they would not be guilty of [illegal] racial discrimination" and that the defendants had "establish[ed] that the promotions of the black individuals ***761** . were in fact required by the terms of the consent decree." *Id.*, at 28a.

On appeal, the Eleventh Circuit reversed. It held that, "[b]ecause ... [the *Wilks* respondents] were neither parties nor privies to the consent decrees, ... their independent claims of unlawful discrimination are not precluded." *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (1987). The court explicitly rejected the doctrine of "impermissible collateral attack" espoused by other Courts of Appeals to immunize parties to a consent decree from charges of discrimination by nonparties for actions taken pursuant to the decree. *Ibid.* Although it recognized a "strong public policy in favor of voluntary affirmative action plans," the panel acknowledged that this interest "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed." *Ibid.* The court remanded the case for trial of the discrimination claims, suggesting that the operative law for judging the consent decrees was that governing voluntary affirmative-action plans. *Id.*, at 1497. [1]

[1] **[2]** We granted certiorari, 487 U.S. 1204, 108 S.Ct. 2843, 101 L.Ed.2d 881 (1988), and now affirm the Eleventh Circuit's judgment. All agree that "[i]t is a principle of general

application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). See, *e.g.*, ***762** *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327, n. 7, 99 S.Ct. 645, 649, n. 7, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct. 1562, 1569, 23 L.Ed.2d 129 (1969). This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981) (hereafter 18 Wright). A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings. [2]

****2185** [3] Petitioners argue that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible "collateral attack." They argue that respondents were aware that the underlying suit might affect them, and if they chose to pass up an opportunity to intervene, they should not be permitted to later litigate the issues in a new action. The position has sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals, [3] but we agree with the contrary view expressed ***763** by the Court of Appeals for the Eleventh Circuit in these cases.

We begin with the words of Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894 (1934):

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.*, at 441, 54 S.Ct., at 479.

While these words were written before the adoption of the Federal Rules of Civil Procedure, we think the Rules incorporate the same principle; a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined. See *Hazeltine, supra*, 395 U.S., at 110, 89 S.Ct., at 1569 (judgment against Hazeltine vacated because it was not named as a party or served, even though as the parent corporation of one of the parties it clearly knew of the claim against it and had made a special appearance to contest jurisdiction). Against the background of permissive intervention set forth in *Chase National Bank*, the drafters cast Rule 24, governing intervention, in permissive terms. See Fed.Rule Civ.Proc. 24(a) (intervention as of right) ("Upon timely application anyone shall be permitted to intervene"), ***764** Fed.Rule Civ.Proc. 24(b) (permissive intervention) ("Upon timely application anyone may be permitted to intervene"). They determined that the concern for finality and completeness of judgments would be "better [served] by mandatory joinder procedures." 18 Wright § 4452, p. 453. Accordingly, Rule 19(a) provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may "leave .. persons already parties subject to a substantial risk of incurring ... inconsistent obligations...." [4]

****2186** Rule 19(b) sets forth the factors to be considered by a court in deciding whether to allow an action to proceed in the absence of an interested party. [5]

***765** Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. [6] The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the "impermissible collateral attack" doctrine-the attribution of preclusive effect to a failure to intervene-is therefore quite inconsistent with Rule 19 and Rule 24.

Petitioners argue that our decisions in *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968), and *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), suggest an opposite result. The *Penn-Central* litigation took place in a special statutory framework enacted by Congress to allow reorganization of a huge railway system. Primary jurisdiction was in the Interstate Commerce Commission, with very restricted review in a statutory three-judge District Court. Review proceedings ***766** were channeled to the District Court for the Southern District of New York, and proceedings in other District Courts were stayed. The District Court upheld the decision of the Interstate Commerce Commission in both the merger and the inclusion

proceedings, and the parties to that proceeding appealed to this Court. Certain Pennsylvania litigants had sued in the District Court for the Middle District of Pennsylvania to set aside the Commission's order, and this action was stayed pending the decision in the District Court for the **2187 Southern District of New York. We held that the borough of Moosic, one of the Pennsylvania litigants, could not challenge the Commission's approval of the merger and inclusion in the Pennsylvania District Court, pointing out the unusual nationwide character of the action and saying "[i]n these circumstances, it would be senseless to permit parties seeking to challenge the merger and the inclusion orders to bring numerous suits in many different district courts." 389 U.S., at 505, n. 4, 88 S.Ct., at 612, n. 4.

We do not think that this holding in *Penn-Central*, based as it was upon the extraordinary nature of the proceedings challenging the merger of giant railroads and not even mentioning Rule 19 or Rule 24, affords a guide to the interpretation of the rules relating to joinder and intervention in ordinary civil actions in a district court.

Petitioners also rely on our decision in *Provident Bank*, *supra*, as authority for the view which they espouse. In that case we discussed Rule 19 shortly after parts of it had been substantially revised, but we expressly left open the question whether preclusive effect might be attributed to a failure to intervene. 390 U.S., at 114-115, 88 S.Ct., at 740-741.

Petitioners contend that a different result should be reached because the need to join affected parties will be burdensome and ultimately discouraging to civil rights litigation. Potential adverse claimants may be numerous and difficult to identify, if they are not joined, the possibility for inconsistent *767 judgments exists. Judicial resources will be needlessly consumed in relitigation of the same question.

Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant Rules. But we are not persuaded that their acceptance would lead to a more satisfactory method of handling cases like these. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other. No one can seriously contend that an employer might successfully defend against a Title VII claim by one group of employees on the ground that its actions were required by an earlier decree entered in a suit brought against it by another, if the later group did not have adequate notice or knowledge of the earlier suit.

The difficulties petitioners foresee in identifying those who could be adversely affected by a decree granting broad remedial relief are undoubtedly present, but they arise from the nature of the relief sought and not because of any choice between mandatory intervention and joinder. Rule 19's provisions for joining interested parties are designed to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways. We doubt that a mandatory intervention rule would be any less awkward. As mentioned, plaintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected. Petitioners' alternative does not eliminate the need for, or difficulty of, identifying persons who, because of their interests, should be included in a lawsuit. It merely shifts that responsibility to less able shoulders.

*768 Nor do we think that the system of joinder called for by the Rules is likely to produce more relitigation of issues than the converse rule. The breadth of a lawsuit and concomitant relief may be at least partially shaped in advance through Rule 19 to avoid needless clashes with future litigation. And even under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate **2188 issues. Additional questions about the adequacy and timeliness of knowledge would inevitably crop up. We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present ones.

Petitioners also urge that the congressional policy favoring voluntary settlement of employment discrimination claims, referred to in cases such as *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), also supports the "impermissible collateral attack" doctrine. But once again it is essential to note just what is meant by "voluntary settlement." A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement. This is true even if the second group of employees is a party to the litigation.

> "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party ... without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters v. Cleveland*, 478 U.S. 501, 529, 106 S.Ct. 3063, 3079, 92 L.Ed.2d 405 (1986).

Insofar as the argument is bottomed on the idea that it may be easier to settle claims among a disparate group of affected persons if they are all before the court, joinder bids fair to accomplish that result as well as a regime of mandatory intervention.

***769** For the foregoing reasons we affirm the decision of the Court of Appeals for the Eleventh Circuit. That court remanded the case for trial of the reverse discrimination claims. *Birmingham Reverse Discrimination*, 833 F.2d, at 1500-1502. Petitioners point to language in the District Court's findings of fact and conclusions of law which suggests that respondents will not prevail on the merits. We agree with the view of the Court of Appeals, however, that the proceedings in the District Court may have been affected by the mistaken view that respondents' claims on the merits were barred to the extent they were inconsistent with the consent decree.

Affirmed.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

As a matter of law there is a vast difference between persons who are actual parties to litigation and persons who merely have the kind of interest that may as a practical matter be impaired by the outcome of a case. Persons in the first category have a right to participate in a trial and to appeal from an adverse judgment; depending on whether they win or lose, their legal rights may be enhanced or impaired. Persons in the latter category have a right to intervene in the action in a timely fashion,[1] or they may be joined as parties against their will.[2] But if they remain on the sidelines, they ***770** may be harmed as a practical matter even though their legal ****2189** rights are unaffected.[3] One of the disadvantages of sideline-sitting is that the bystander has no right to appeal from a judgment no matter how harmful it may be.

In these cases the Court quite rightly concludes that the white firefighters who brought the second series of Title VII cases could not be deprived of their legal rights in the first series of cases because they had neither intervened nor been joined as parties. See *Firefighters v. Cleveland*, 478 U.S. 501, 529-530, 106 S.Ct. 3063, 3079-3080, 92 L.Ed.2d 405 (1986); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327, n. 7, 99 S.Ct. 645, 649, n. 7, 58 L.Ed.2d 552 (1979). The consent decrees obviously could not deprive them of any contractual rights, such as seniority, cf. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), or accrued vacation pay, cf. *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989), or of any other legal rights, such as the right to have their employer comply with federal statutes like Title VII, cf. *Firefighters v. Cleveland*, *supra*, 478 U.S., at 529, 106 S.Ct., at 3079.[4] There is no reason, however, why the consent decrees ***771** might not produce changes in conditions at the white firefighters' place of employment that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense. The fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from that decree without becoming parties.

Persons who have no right to appeal from a final judgment—either because the time to appeal has elapsed or because they never became parties to the case—may nevertheless collaterally attack a judgment on certain narrow grounds. If the court had no jurisdiction over the subject matter, or if the judgment is the product of corruption, duress, fraud, collusion, or mistake, under limited circumstances it may be set aside in an appropriate collateral proceeding. See Restatement (Second) of Judgments §§ 69-72 (1982), *Griffith v. Bank of New York*, 147 F.2d 899, 901 (CA2) (Clark, J.), cert. denied, 325 U.S. 874, 65 S.Ct. 1414, 89 L.Ed. 1992 (1945). This rule not only applies to parties to the original action, but also allows interested third parties collaterally to attack judgments.[5] In both civil and ****2190** criminal cases, however, the ***772** grounds that may be invoked to support a collateral attack are much more limited than those that may be asserted as error on direct appeal.[6] Thus, a person who can foresee that a lawsuit is likely to have a practical impact on his interests may pay a heavy price if he elects to sit on the sidelines instead of intervening and taking the risk that his legal rights will be impaired.

In these cases there is no dispute about the fact that respondents are not parties to the consent decrees. It follows as a matter of course that they are not bound by those decrees.[7] Those judgments could not, and did not, deprive *773 them of any legal rights. The judgments did, however, have a practical impact on respondents' opportunities for advancement in their profession. For that reason, respondents had standing to challenge the validity of the decrees, but the grounds that they may advance in support of a collateral challenge are much more limited than would be allowed if they were parties prosecuting a direct appeal.[8]

**2191 The District Court's rulings in these cases have been described incorrectly by both the Court of Appeals and this Court. The Court of Appeals repeatedly stated that the District *774 Court had "in effect" held that the white firefighters were "bound" by a decree to which they were not parties.[9] And this Court's opinion seems to assume that the District Court had interpreted its consent decrees in the earlier litigation as holding "that the white firefighters were precluded from challenging employment decisions taken pursuant to the decrees." *Ante*, at 2183.[10] It is important, therefore, to make clear exactly what the District Court did hold and why its judgment should be affirmed.

I

The litigation in which the consent decrees were entered was a genuine adversary proceeding. In 1974 and 1975, two groups of private parties and the United States brought three separate Title VII actions against the city of Birmingham (City), the Personnel Board of Jefferson County (Board), and various officials,[11] alleging discrimination in hiring *775 and promotion in several areas of employment, including the fire department. After a full trial in 1976, the District Court found that the defendants had violated Title VII and that a test used to screen job applicants was biased. App. 553. After a second trial in 1979 that focused on promotion practices-but before the District Court had rendered a decision-the parties negotiated two consent decrees, one with the City defendants and the other with the Board. App. to Pet. for Cert. 122a (City decree), 202a (Board decree). The United States is a party to both decrees. The District Court provisionally approved the proposed decrees and directed that the parties provide notice "to all interested persons informing them of the general provisions of the Consent Decrees ... and of their right to file objections." App. 695. Approximately two months later, the District Court conducted a fairness hearing, at which a group of black employees objected to the decrees as inadequate and a group of white firefighters-represented in part by the Birmingham Firefighters Association (BFA)-opposed any race-conscious relief. *Id.*, at 727. The District Court **2192 overruled both sets of objections and entered the decrees in August 1981. 28 FEP Cases 1834 (ND Ala.1981).

In its decision approving the consent decrees, the District Court first noted "that there is no contention or suggestion that the settlements are fraudulent or collusive." *Id.*, at 1835. The court then explained why it was satisfied that the affirmative-action goals and quotas set forth in the decrees were "well within the limits upheld as permissible" in *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), and other cases. 28 FEP Cases, at 1836. It pointed out that the decrees "do not preclude the hiring or promotion of whites and males even for a temporary period of time," *ibid.*, and that the City's commitment to promote blacks and whites to the position of fire lieutenant at the same rate was temporary and was subject both to the availability of qualified candidates *776 and "to the caveat that the decree is not to be interpreted as requiring the hiring or promotion of a person who is not qualified or of a person who is demonstrably less qualified according to a job-related selection procedure," *id.*, at 1837. It further found that the record provided "more than ample reason" to conclude that the City would eventually be held liable for discrimination against blacks at high-level positions in the fire and police departments.[12] *Id.*, at 1838. Based on *777 its understanding of the wrong committed, the court concluded that the remedy embodied in the consent decrees was "reasonably commensurate with the nature and extent of the indicated discrimination." *Ibid.* Cf. *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974). The District Court then rejected other specific objections, pointing out that the decrees would not impinge on any contractual rights of the unions or their members. 28 FEP Cases, at 1839. Finally, after noting that it had fully considered the white firefighters' objections to the settlement, it denied their motion to intervene as untimely. *Ibid.*

Several months after the entry of the consent decrees, the Board certified to the **2193 City that five black firefighters, as well as eight whites, were qualified to fill six vacancies in the position of lieutenant. See App. 81. A group of white firefighters then filed suit against the City and Board challenging their policy of "certifying candidates and making promotions on the basis of race under the assumed protection of consent settlements." App. to Pet. for Cert. 113a. The

complaint alleged, in the alternative, that the consent decrees were illegal and void, or that the defendants were not properly implementing them. *Id.*, at 113a-114a. The plaintiffs filed motions for a temporary restraining order and a preliminary injunction. After an evidentiary hearing, the District Court found that the plaintiffs' collateral attack on the consent decrees was "without merit" and that four of the black officers were qualified for promotion in accordance with the terms of the decrees. App. 81-83. Accordingly, it denied the motions, *id.*, at 83, 85-86, and, for the first time in its history, the City had a black lieutenant in its fire department.

***778** The plaintiffs' appeal from that order was consolidated with the appeal that had been previously taken from the order denying the motion to intervene filed in the earlier litigation. The Court of Appeals affirmed both orders. See *United States v. Jefferson County*, 720 F.2d 1511 (CA11 1983). While that appeal was pending, in September 1983, the *Wilks* respondents filed a separate action against petitioners. The *Wilks* complaint alleged that petitioners were violating Title VII, but it did not contain any challenge to the validity of the consent decrees. App. 130. After various preliminary proceedings, the District Court consolidated these cases, along with four other reverse discrimination actions brought against petitioners, under the caption *In re: Birmingham Reverse Discrimination Litigation*. *Id.*, at 218. In addition, over the course of the litigation, the court allowed further parties to intervene. [13]

On February 18, 1985, the District Court ruled on the City's motion for partial summary judgment and issued an opinion that, among other things, explained its understanding of the relevance of the consent decrees to the issues raised in the reverse discrimination litigation. *Id.*, at 277. After summarizing the proceedings that led up to the entry of the consent decrees, the District Court expressly "recognized that the consent decrees might not bar all claims of 'reverse discrimination' since [the plaintiffs] had not been parties to the prior suits." [14] *Id.*, at 279. The court then took a position ***779** with respect to the relevance of the consent decrees that differed from that advocated by any of the parties. The plaintiffs contended that the consent decrees, even if valid, did not constitute a defense to their action, cf. *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), and, in the alternative, that the decrees did not authorize the promotion of black applicants ahead of higher scoring white applicants and thus did not justify race-conscious promotions. App. 281-282. The City, on the other hand, contended that the promotions were immunized from challenge if they were either required or permitted by the terms of the decrees. *Id.*, at 282. The District Court took the intermediate position that promotions required by-and ****2194** made because of-the decrees were justified. [15] However, it denied the City's summary judgment motion because it raised factual issues requiring a trial. *Id.*, at 288-289.

In December 1985, the court conducted a 5-day trial limited to issues concerning promotions in the City's fire and engineering departments. [16] At that trial, respondents challenged ***780** the validity of the consent decrees; to meet that challenge, petitioners introduced the records of the 1976 trial, the 1979 trial, and the fairness hearing conducted in 1981. Respondents also tried to prove that they were demonstrably better qualified than the black firefighters who had been promoted ahead of them. At the conclusion of the trial, the District Court entered a partial final judgment dismissing portions of the plaintiffs' complaints. The judge explained his ruling in an oral opinion dictated from the bench, supplemented by the adoption, with some changes, of detailed findings and conclusions drafted by the prevailing parties. See App. to Pet. for Cert. 27a, 37a.

In his oral statement, the judge adhered to the legal position he had expressed in his February ruling. He stated:

> "The conclusions there expressed either explicitly or implicitly were that under appropriate circumstances, a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination, even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner.
>
> "In that February order, it was my view as expressed then, that if the City of Birmingham made promotions of blacks to positions as fire lieutenant, fire captain and civil engineer, because the City believed it was required to do so by the consent decree, and if in fact the City was required to do so by the Consent Decree, then they would not be guilty of racial discrimination, either ***781** under Title 7, Section 1981, 1983 or the 14th Amendment. That remains my conclusion given the state of the law as I understand it." *Id.*, at 77a.

He then found as a matter of fact that petitioners had not promoted any black officers who were not qualified or who were demonstrably less qualified than the whites who were not promoted. He thus rejected respondents' contention that

the City could not claim that it simply acted as required **2195 by terms of the consent decree: [17]

> "In this case, under the evidence as presented here, I find that even if the burden of proof be placed on the defendants, they have carried that proof and that burden of establishing that the promotions of the black individuals in this case were in fact required by the terms of the consent decree." *Id.*, at 78a.

The written conclusions of law that he adopted are less clear than his oral opinion. He began by unequivocally stating: "The City Decree is lawful." [18] *Id.*, at 106a. He explained that "under all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham." [19] *Id.*, at 106a-107a. *782 In that same conclusion, however, he did state that "plaintiffs cannot collaterally attack the Decree's validity." *Id.*, at 106a. Yet, when read in context-and particularly in light of the court's finding that the decree was lawful under Eleventh Circuit and Supreme Court precedent-it is readily apparent that, at the extreme, this was intended as an alternative holding. More likely, it was an overstatement of the rule that collateral review is narrower in scope than appellate review. In any event, and regardless of one's reading of this lone sentence, it is absolutely clear that the court did not hold that respondents were bound by the decree. Nowhere in the District Court's lengthy findings of fact and conclusions of law is there a single word suggesting that respondents were bound by the consent decree or that the court intended to treat them as though they had been actual parties to that litigation and not merely as persons whose interests, as a practical matter, had been affected. Indeed, respondents, the Court of Appeals, and the majority opinion all fail to draw attention to any point in these cases' long history at which the judge may have given the impression that any nonparty was legally bound by the consent decree. [20]

*783 **2196 II

Regardless of whether the white firefighters were parties to the decrees granting relief to their black co-workers, it would be quite wrong to assume that they could never collaterally attack such a decree. If a litigant has standing, he or she can always collaterally attack a judgment for certain narrowly defined defects. See, *e.g.*, *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949); and cases cited in n. 5, *supra*. See also *Korematsu v. United States*, 584 F.Supp. 1406 (ND Cal.1984) (granting writ of *coram nobis* vacating conviction based on Government concealment of critical contradictory evidence in *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944)). On the other hand, a district court is not required to retry a case-or to sit in review of another court's judgment-every time an interested nonparty asserts that *some* error that might have been raised on direct appeal was committed. See nn. 6 and 8, *supra*. Such a broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts. [21] Here, respondents have offered no circumstance *784 that might justify reopening the District Court's settled judgment.

The implementation of a consent decree affecting the interests of a multitude of nonparties, and the reliance on that decree as a defense to a charge of discrimination in hiring and promotion decisions, raise a legitimate concern of collusion. No such allegation, however, has been raised. Moreover, there is compelling evidence that the decrees were not collusive. In its decision approving the consent decrees over the objection of the BFA and individual white firefighters, the District Court observed that there had been "no contention or suggestion" that the decrees were fraudulent or collusive. 28 FEP Cases, at 1835. The record of the fairness hearing was made part of the record of this litigation, and this finding was not contradicted. More significantly, the consent decrees were not negotiated until after the 1976 trial and the court's finding that the City had discriminated against black candidates for jobs as police officers and firefighters, see App. 553, and until after the 1979 trial, at which substantial evidence was presented suggesting that the City also discriminated against black candidates for promotion in the fire department, see n. 12, *supra*. Like the record of the 1981 fairness hearing, the records of both of these prior proceedings were *785 made part of the record in these cases. Given this history, the lack of any indication of collusion, and the District **2197 Court's finding that "there is more than ample reason for ... the City of Birmingham to be concerned that [it] would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments," 28 FEP Cases, at 1838, it is evident that the decrees were a product of genuine arm's-length negotiations.

Nor can it be maintained that the consent judgment is subject to reopening and further litigation because the relief

it afforded was so out of line with settled legal doctrine that it "was transparently invalid or had only a frivolous pretense to validity"[22] *Walker v. Birmingham*, 388 U.S. 307, 315, 87 S.Ct. 1824, 1829, 18 L.Ed.2d 1210 (1967) (suggesting that a contemner might be allowed to challenge contempt citation on ground that underlying court order was "transparently invalid"). To the contrary, the type of race-conscious relief ordered in the consent decrees is entirely consistent with this Court's approach to affirmative action. Given a sufficient predicate of racial discrimination, neither the Equal Protection Clause of the Fourteenth Amendment[23] nor Title VII of the Civil Rights Act ***786** of 1964[24] erects a bar to affirmative-action plans that benefit non-victims and have some adverse effect on nonwrongdoers.[25] As Justice O'CONNOR observed ****2198** in *Wygant v.* ***787** *Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986): "This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required." *Id.*, at 286, 106 S.Ct., at 1853 (opinion concurring in part and concurring in judgment). Such a belief was clearly justified in these cases. After conducting the 1976 trial and finding against the City and after listening to the five days of testimony in the 1979 trial, the judge was well qualified to conclude that there was a sound basis for believing that the City would likely have been found to have violated Title VII if the action had proceeded to a litigated judgment.[26]

Hence, there is no basis for collaterally attacking the judgment as collusive, fraudulent, or transparently invalid. Moreover, respondents do not claim-nor has there been any showing of-mistake, duress, or lack of jurisdiction. Instead, respondents are left to argue that somewhat different relief would have been more appropriate than the relief that was actually granted. Although this sort of issue may provide the basis for a direct appeal, it cannot, and should not, serve to open the door to relitigation of a settled judgment

***788** III

The facts that respondents are not bound by the decrees and that they have no basis for a collateral attack, moreover, do not compel the conclusion that the District Court should have treated the decrees as nonexistent for purposes of respondents' discrimination suit. That the decrees may not directly interfere with any of respondents' legal rights does not mean that they may not affect the factual setting in a way that negates respondents' claim. The fact that a criminal suspect is not a party to the issuance of a search warrant does not imply that the presence of a facially valid warrant may not be taken as evidence that the police acted in good faith. See *Malley v. Briggs*, 475 U.S. 335, 344-345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986); *United States v. Leon*, 468 U.S. 897, 921-922, 924, 104 S.Ct. 3405, 3419-3420, 3421, 82 L.Ed.2d 677 (1984); *United States v. Ross*, 456 U.S. 798, 823, n. 32, 102 S.Ct. 2157, 2172, n. 32, 72 L.Ed.2d 572 (1982). Similarly, the fact that an employer is acting under court compulsion may be evidence that the employer is acting in good faith and without discriminatory intent. Cf. *Ashley v. City of Jackson*, 464 U.S. 900, 903, 104 S.Ct. 255, 258, 78 L.Ed.2d 241 (1983) (REHNQUIST, J., dissenting from denial of certiorari) (suggesting that compliance with a consent decree "might be relevant to a defense of good-faith immunity"); Restatement (Second) of Judgments § 76, Comment *a*, p. 217 (1982) ("If the judgment is held to be not binding on the person against whom it is invoked, it is then ignored in the determination of matters in issue in the subsequent litigation, unless it is relevant for some other purpose such as proving the good faith of a party who relied on it"). Indeed, ****2199** the threat of a contempt citation provides as good a reason to act as most, if not all, other business justifications.[27]

***789** After reviewing the evidence, the District Court found that the City had in fact acted under compulsion of the consent decrees. App. to Pet. for Cert. 107a; *In re Birmingham Reverse Discrimination Employment Litigation*, 36 EPD ¶ 35022 p. 36,586 (ND Ala. 1985). Based on this finding, the court concluded that the City carried its burden of coming forward with a legitimate business reason for its promotion policy, and, accordingly, held that the promotion decisions were "not taken with the requisite discriminatory intent" necessary to make out a claim of disparate treatment under Title VII or the Equal Protection Clause. App. to Pet. for Cert. 107a, citing *United States v. Jefferson County*, 720 F.2d, at 1518. For this reason, and not because it thought that respondents were legally bound by the consent decrees, the court entered an order in favor of the City and defendant-intervenors.

Of course, in some contexts a plaintiff might be able to demonstrate that reference to a consent decree is pretextual. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). For example, a plaintiff might be able to show that the consent decree was collusive and that the defendants simply obtained the court's

rubber stamp on a private agreement that was in no way related to the eradication of pervasive racial discrimination. The plaintiff, alternatively, might be able to show that the defendants were not bound to obey the consent decree because the court that entered it was without jurisdiction. See *United States v. Mine* ***790** *Workers*, 330 U.S. 258, 291-294, 67 S.Ct. 677, 694-696, 91 L.Ed. 884 (1947). Similarly, although more tenuous, a plaintiff might argue that the parties to the consent judgment were not bound because the order was "transparently invalid" and thus unenforceable.[28] If the defendants were as a result not bound to implement the affirmative-action program, then the plaintiff might be able to show that the racial preference was not a product of the court order.

In a case such as these, however, in which there has been no showing that the decree was collusive, fraudulent, transparently ****2200** invalid, or entered without jurisdiction, it would be "unconscionable" to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability. Cf. *Farmers v. WDAY, Inc.*, 360 U.S. 525, 531, 79 S.Ct. 1302, 1306, 3 L.Ed.2d 1407 (1959). Rather, all of the reasons that support the Court's view that a police officer should not generally be held liable when he carries out the commands in a facially valid warrant apply with added force to city officials, or indeed to private employers, who obey the commands contained in a decree entered by a federal court.[29] In fact, Equal Employment ***791** Opportunity Commission regulations concur in this assessment. They assert: "The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." 29 CFR § 1608.8 (1989).[30] Assuming that the District Court's findings of fact were not clearly erroneous-which of course is a matter that is not before us-it seems perfectly clear that its judgment should have been affirmed. Any other conclusion would subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counterproductive result.

IV

The predecessor to this litigation was brought to change a pattern of hiring and promotion practices that had discriminated against black citizens in Birmingham for decades. The white respondents in these cases are not responsible for that history of discrimination, but they are nevertheless beneficiaries of the discriminatory practices that the litigation was designed to correct. Any remedy that seeks to create employment conditions that would have obtained if there had been no violations of law will necessarily have an adverse impact on whites, who must now share their job and promotion opportunities ***792** with blacks.[31] Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of the past wrongs.

There is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that ****2201** a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong. See *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 505-506, 88 S.Ct. 602, 611-612, 19 L.Ed.2d 723 (1968). Cf. *Bergh v. Washington*, 535 F.2d 505, 507 (CA9), cert. denied, 429 U.S. 921, 97 S.Ct. 318, 50 L.Ed.2d 288 (1976); *Safir v. Dole*, 231 U.S.App.D.C. 63, 70-71, 718 F.2d 475, 482-83 (1983), cert. denied, 467 U.S. 1206, 104 S.Ct. 2389, 81 L.Ed.2d 347 (1984); James & Hazard § 11.31, pp. 651-652.

There is no need, however, to go that far in order to agree with the District Court's eminently sensible view that compliance with the terms of a valid decree remedying violations of Title VII cannot itself violate that statute or the Equal Protection Clause.[32] The city of Birmingham, in entering into ***793** and complying with this decree, has made a substantial step toward the eradication of the long history of pervasive racial discrimination that has plagued its fire department. The District Court, after conducting a trial and carefully considering respondents' arguments, concluded that this effort is lawful and should go forward. Because respondents have thus already had their day in court and have failed to carry their burden, I would vacate the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

1 Judge Anderson, dissenting, "agree[d] with the opinion for the court that these plaintiffs [the *Wilks* respondents] were not parties to the prior litigation which resulted in the consent decree, and that the instant plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree prospectively and test its validity against the recent Supreme Court precedent." *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d, at 1503. He distinguished, however, between claims for prospective relief and claims for backpay, the latter being barred, in his opinion, by the City's good-faith reliance on the decrees. *Id.*, at 1502.

2 We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. See *Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S.Ct. 115, 117-118, 85 L.Ed. 22 (1940) ("class" or "representative" suits); Fed.Rule Civ.Proc. 23 (same); *Montana v. United States*, 440 U.S. 147, 154-155, 99 S.Ct. 970, 974-975, 59 L.Ed.2d 210 (1979) (control of litigation on behalf of one of the parties in the litigation). Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-530, n. 10, 104 S.Ct. 1188, 1198, n. 10, 79 L.Ed.2d 482 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court ... or be lost"), *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (nonclaim statute terminating unsubmitted claims against the estate). Neither of these exceptions, however, applies in these cases.

3 For a sampling of cases from the Circuits applying the "impermissible collateral attack" rule or its functional equivalent, see, *e.g.*, *Striff v. Mason*, 849 F.2d 240, 245 (CA6 1988), *Marino v. Ortiz*, 806 F.2d 1144, 1146-1147 (CA2 1986), aff'd, by an equally divided Court, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988); *Thaggard v. Jackson*, 687 F.2d 66, 68-69 (CA5 1982), cert. denied *sub nom. Ashley v. City of Jackson*, 464 U.S. 900, 104 S.Ct. 255, 78 L.Ed.2d 241 (1983) (REHNQUIST, J., joined by BRENNAN, J., dissenting), *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 558 (CA6 1982), rev'd on other grounds *sub nom. Firefighters v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), *Dennison v. Los Angeles Dept. of Water & Power*, 658 F.2d 694, 696 (CA9 1981); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (CA4 1981), cert. denied, 455 U.S. 940, 102 S.Ct. 1431, 71 L.Ed.2d 650 (1982), *Society Hill Civic Assn. v. Harris*, 632 F.2d 1045, 1052 (CA3 1980). Apart from the instant one, the only Circuit decision of which we are aware that would generally allow collateral attacks on consent decrees by nonparties is *Dunn v. Carey*, 808 F.2d 555, 559-560 (CA7 1986).

4 Rule 19(a) provides:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction ... *shall* be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) *the person claims an interest relating to the subject of the action* and is so situated that the disposition of the action in the person's absence may (i) *as a practical matter impair or impede the person's ability to protect that interest* or (ii) *leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.* If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action." (Emphasis added.)

5 Rule 19(b) provides:

> "If a person ... cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to

> the person or those already parties, second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate, fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

6 The dissent argues, on the one hand, that respondents have not been "bound" by the decree but, rather, that they are only suffering practical adverse effects from the consent decree *Post,* at 2188-2190. On the other hand, the dissent characterizes respondents' suit not as an assertion of their own independent rights, but as a collateral attack on the consent decrees which, it is said, can only proceed on very limited grounds. *Post,* at 2195-2198 Respondents in their suit have alleged that they are being racially discriminated against by their employer in violation of Title VII: either the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents' Title VII claims or it is not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree

1 Federal Rule of Civil Procedure 24(a) provides in part:

> "Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

2 Federal Rule of Civil Procedure 19(a) provides in part:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest...."

3 See *Provident Tradesmens Bank & Trust Co v Patterson,* 390 U.S. 102, 110, 88 S.Ct. 733, 738, 19 L Ed.2d 936 (1968)

4 As Chief Justice REHNQUIST has observed:

> "Suppose, for example, that the Government sues a private corporation for alleged violations of the antitrust laws and then enters a consent decree. Surely, the existence of that decree does not preclude a future suit by another corporation alleging that the defendant company's conduct, even if authorized by the decree, constitutes an antitrust violation. The nonparty has an independent right to bring his own private antitrust action for treble damages or for injunctive relief See 2 P Areeda & D. Turner, Antitrust Law ¶ 330, p. 143 (1978). Similarly, if an action alleging unconstitutional prison conditions results in a consent decree, a prisoner subsequently harmed by prison conditions is not precluded from bringing suit on the mere plea that the conditions are in accordance with the consent decree Such compliance might be relevant to a defense of good-faith immunity, see Pet. for Cert in *Bennett v. Williams,* O.T.1982, No. 82-1704 [464 U.S. 932, 104 S.Ct. 335, 78 L Ed.2d 305 (1983)], but it would not suffice to block the suit altogether." *Ashley v. City of Jackson,* 464 U.S 900, 902-903, 104 S.Ct. 255, 257, 78 L Ed 2d 241 (1983) (opinion dissenting from denial of certiorari).
>
> In suggesting that compliance with a consent decree might be relevant to a defense of good-faith immunity, this passage recognizes that neither due process nor the Rules of Civil Procedure foreclose judicial recognition of a judgment that may have a practical effect on the interests of a nonparty.

5 See F James & G. Hazard, Civil Procedure § 12.15, p. 681 (3d ed 1985) (hereinafter James & Hazard). Since at least 1874, this Court has recognized that a third party may collaterally attack a judgment if the original judgment was obtained through fraud or collusion. In a case brought by an assignee in bankruptcy seeking to recover property allegedly transferred in fraud of the bankrupt's debtors, the Court wrote:

> "Judgments of any court, it is sometimes said, may be impeached by strangers to them for fraud or collusion, but the proposition as stated is subject to certain limitations, as it is only those strangers who, if the judgment is given full credit and effect, would be prejudiced in regard to some pre-existing right who are permitted to set up such a defense. Defenses of the kind may be set up by such strangers Hence the rule that whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained." *Michaels v. Post,* 21 Wall. 398, 426-427, 22 L Ed. 520 (1874) (footnote omitted).

See also *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 184, 41 S Ct. 93, 96, 65 L.Ed. 205 (1920); 1 A. Freeman, Judgments § 318, p. 634 (5th ed. 1925). Similarly, strangers to a decree are sometimes allowed to challenge the decree by showing that the court was without jurisdiction. *Id.*, at p. 633. But cf. *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 (1951) (noting that under Florida law, a child, seeking to protect her interest in her father's estate, may not collaterally attack her parents' divorce for want of jurisdiction). Of course, unlike parties to a decree, the question of subject-matter jurisdiction is not res judicata as to interested third parties. Cf. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, n. 9, 102 S.Ct. 2099, 2104, n. 9, 72 L.Ed.2d 492 (1982).

6 We have long held that proceedings brought before a court collaterally "are by no means subject to all the exceptions which might be taken on a direct appeal." *Thompson v. Tolmie*, 2 Pet. 157, 162, 7 L.Ed. 381 (1829). See also *Teague v. Lane*, 489 U.S. 288, 303-310, 109 S.Ct. 1060, 1071-1075, 103 L.Ed.2d 334 (1989) (petition for writ of habeas corpus), *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-864, 108 S.Ct. 2194, 2204-2205, 100 L.Ed.2d 855 (1988) (Rule 60(b) motion), *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (28 U.S.C. § 2255 motion); *Ackermann v. United States*, 340 U.S. 193, 197-202, 71 S.Ct. 209, 211-214, 95 L.Ed. 207 (1950) (Rule 60(b) motion); *Sunal v. Large*, 332 U.S. 174, 177-179, 67 S.Ct. 1588, 1590-1591, 91 L.Ed. 1982 (1947) (petition for writ of habeas corpus).

7 As we held in *Firefighters v. Cleveland*, 478 U.S. 501, 529-530, 106 S.Ct. 3063, 3079, 92 L.Ed.2d 405 (1986):

> "Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori*, may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting [individuals]. .. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. See, *e.g.*, *United States v. Ward Baking Co.*, 376 U.S. 327, 84 S.Ct. 763, 11 L.Ed.2d 743 (1964), *Hughes v. United States*, 342 U.S. 353, 72 S.Ct. 306, 96 L.Ed. 394 (1952); *Ashley v. City of Jackson*, 464 U.S., at 902, 104 S.Ct., at 257 (REHNQUIST, J., dissenting from denial of certiorari), 1B Moore ¶ 0.409 [5], p. 326, n. 2. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. See *United States v. Armour & Co.*, 402 U.S. [673], at 676-677 [91 S.Ct. 1752, 1754-1755, 29 L.Ed.2d 256 (1971)]."

8 The Eleventh Circuit, in a decision involving a previous attempt by white firefighters to set aside the consent decrees at issue in this litigation, itself observed: "There are ... limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties." *United States v. Jefferson County*, 720 F.2d 1511, 1518 (1983).

Professors James and Hazard describe the rule as follows:

"Ordinarily, a nonparty has no legal interest in a judgment in an action between others. Such a judgment does not determine the nonparty's rights and obligations under the rules of res judicata and he may so assert if the judgment is relied upon against him. But in some situations one's interests, particularly in one's own personal legal status or claims to property, may be placed in practical jeopardy by a judgment between others. In such circumstances one may seek the aid of a court of equity, but *the grounds upon which one may rely are severely limited.* The general rule is that one must show either that the judgment was void for lack of jurisdiction of the subject matter or that it was the product of fraud directed at the petitioner." James & Hazard § 12.15, p. 681 (emphasis supplied; footnotes omitted).

9 The Court of Appeals wrote:

-"Both the City and the Board, however, denied that they had violated Title VII or the equal protection clause. Both contended that the plaintiffs were bound by the consent decrees and that the promotions were therefore lawful as a matter of law because they had been made pursuant to those decrees." *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1496 (CA11 1987).

-"Without expressly so stating, the district judge treated the plaintiffs as if they were bound by the consent decrees and as if they were alleging solely that the City had violated the City decree." *Ibid.*

-"The court held that the plaintiffs-both the United States and the individual plaintiffs-were bound by the consent decrees." *Id.*, at 1497.

-"In effect, the court treated the plaintiffs as if they were parties to the City decree seeking an order to show cause why the City should not be held in civil contempt for violating the terms of the decree." *Id.*, at 1497, n. 16.

10 See also, *ante*, at 2184, where the Court suggests that the District Court held that its consent decrees had "conclude[d] the rights of strangers to those proceedings." (Footnote omitted.)

11 These parties, along with six black firefighters who were party-plaintiffs to the 1974-1975 litigation, are petitioners herein.

12 In approving the decree, the District Court expressed confidence that the United States and the black firefighters brought suit in good faith and that there was a strong evidentiary basis for their complaints. It observed:

> "The objectors treat this case as one in which discrimination on the basis of race or sex has not been established. That is only partially true, at least as it relates to positions in the police and fire departments. This court at the first trial found-and the Fifth Circuit agreed-that blacks applying for jobs as police officers and firefighters were discriminated against by the tests used by the Personnel Board to screen and rank applicants. The evidence presented at the second trial established, at the .01 level of statistical significance, that blacks were adversely affected by the exam used by the Personnel Board to screen and rank applicants for the position of police sergeant. Since governmental employers such as the City of Birmingham have been limited by state law to selecting candidates from among those certified by the Board, one would hardly be surprised to find that the process as a whole has had an adverse effect upon blacks seeking employment as Birmingham police officers, police sergeants, or firefighters-regardless of whether or not there was any actual bias on the part of selecting officials of the City. A natural consequence of discrimination against blacks at entry-level positions in the police and fire departments would be to limit their opportunities for promotion to higher levels in the departments.
>
> "Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City-that, notwithstanding this court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of a 'fair hiring ordinance' and of affirmative action plans, the effects of past discrimination against blacks persist. According to those figures, 79 of the 480 police officers are black, 3 of the 131 police sergeants are black, and none of the 40 police lieutenants and captains are black. In the fire department, 42 of the 453 firefighters are black, and none of the 140 lieutenants, captains, and battalion chiefs are black." 28 FEP Cases, at 1837-1838.
>
> The evidence of discrimination presented at the 1979 trial is described in greater detail in the United States' 100-page, post-trial brief, which is reprinted in the Joint Appendix. See App. 594-693.

13 Among those allowed to intervene were seven black firefighters who were parties to the consent decrees and who sought to defend the decrees, the United States, which reversed course in the litigation and aligned itself with the plaintiffs; and additional white firefighters pressing individual reverse discrimination claims.

14 During an earlier hearing, the District Court informed counsel:

> "I do believe that the Court of Appeals said there is no per se prohibition against an attack, an indirect attack, in any event by a person whose rights may be affected during the implementation or claims implementation of the decree. To the extent the motions to dismiss or summary judgment take that position, I think the Court of Appeals said, no, that is not the law of this Circuit." *Id.*, at 237.

15 The court indicated that if the race-conscious promotions were a product of the City's adherence to pending court orders (*i.e.*, the consent decrees), it could not be said that the City acted with the requisite racially discriminatory intent. See *id.*, at 280 ("[T]he court is persuaded that the defendants can ... defend these reverse discrimination claims if they establish that the challenged promotions were made because of the requirements of the consent decree"). See also Tr. (May 14, 1984), reprinted in App. 237. In reaching this conclusion, the District Court was well aware of the Court of Appeals' previous suggestion that such a defense might be available:

> "The consent decree would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by the consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree, and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question... We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing.' " App. 280-281, n. 6, quoting *United States v. Jefferson County*, 720 F.2d, at 1518-1519.

16 At the close of the plaintiffs' case, the District Court granted the motion of the Board to dismiss the claims against it pursuant to Federal Rule of Civil Procedure 41(b). The basis for the motion was the fact that, even without regard to the consent decrees, the plaintiffs had not proved a prima facie case against the Board, which had done nothing more than provide the City with the names of employees, both white and black, who were qualified for promotion. There was no evidence that the Board's certification process, or its testing procedures, adversely affected whites. I am at a loss to understand why the Court of Appeals did not affirm the judgment in favor of the Board.

17 Paragraph 2 of the City decree provides, in pertinent part:

"Nothing herein shall be interpreted as requiring the City to ... promote a person who is not qualified . or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. to Pet. for Cert. 124a.

18 The District Court's opinion does not refer to the second consent decree because the claims against the Board had been dismissed at the end of the plaintiffs' case. See n. 16, *supra*.

19 In support of this proposition, the court cited, *inter alia*, our decision in *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). We recently reaffirmed the *Weber* decision in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). See also *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (plurality opinion); *id.*, at 483, 106 S.Ct., at 3024-3025 (Powell, J., concurring in part and concurring in judgment), *id.*, at 489, 106 S.Ct., at 3057 (O'CONNOR, J., concurring in part and dissenting in part), *id.*, at 499, 106 S.Ct., at 3062 (WHITE, J., dissenting) (all reaffirming that courts are vested with discretion to award race-conscious relief).

20 In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S., at 114, 88 S.Ct., at 740, we expressly did not decide whether a litigant might "be bound by [a] previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene." See Note, Preclusion of Absent Disputants to Compel Intervention, 79 Colum.L.Rev. 1551 (1979) (arguing in favor of such a rule of mandatory intervention); 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1608, p. 115, n. 33 (2d ed. 1986) (drawing a parallel between the mandatory intervention rule and this Court's decision in *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968)). Today, the Court answers this question, at least in the limited context of the instant dispute, holding that "[j]oinder as a party [under Federal Rule of Civil Procedure 19], rather than knowledge of a lawsuit and an opportunity to intervene [under Federal Rule of Civil Procedure 24], is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Ante*, at 2186. See also *ante*, at 2185 ("[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined"). Because I conclude that the District Court did not hold that respondents were bound by the consent decrees, I do not reach this issue.

21 One leading commentator relies on the following poignant language employed by the Virginia Supreme Court to explain the significance of the doctrine limiting collateral attacks:

"'It is one ... which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of the litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title.'" 1 H. Black, Law of Judgments § 245, pp. 365-366 (2d ed. 1902), quoting *Lancaster v. Wilson*, 27 Gratt. 624, 629 (Va.1876).

In addition to undermining this interest in finality, permitting collateral attacks also leads to the anomaly that courts will, on occasion, be required to sit in review of judgments entered by other courts of equal-or even greater-authority. Cf. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-623, 109 S.Ct. 2037, 2047-2048, 104 L.Ed.2d 696 (1989); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). The rule is also supported by the fact that there is no assurance that a second round of litigation is more likely than the first to reach a just result or obtain uniformity in the law.

22 It was argued during the 1981 fairness hearing, in the first complaint filed in this litigation, see App. to Pet. for Cert. 113a, and in at least one of the subsequently filed complaints, see App. 96, that race-conscious relief for persons who are not proven victims of past discrimination is absolutely prohibited by the Equal Protection Clause of the Fourteenth Amendment and by Title VII of the Civil Rights Act of 1964. As I have pointed out, the *Wilks* complaint did not challenge the validity of the decrees. See App. 135-137.

23 See *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 286, 106 S.Ct. 1842, 1853, 90 L.Ed.2d 260 (1986) (O'CONNOR, J., concurring in part and concurring in judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program"). See also *Sheet Metal Workers*, 478 U.S., at 479-481, 106 S.Ct., at 3052-3053 (plurality opinion), *id.*, at 484-489, 106 S.Ct., at 3054-3057 (Powell, J., concurring in part and concurring in judgment).

24 In distinguishing the Court's decision in *Firefighters v. Stotts,* 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), the plurality in *Sheet Metal Workers,* 478 U.S., at 474-475, 106 S.Ct., at 3050, asserted:

> "However, this limitation on *individual* make-whole relief does not affect a court's authority to order race-conscious affirmative action. The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members, no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination. In this case, neither the membership goal nor the Fund order required petitioners to indenture or train particular individuals, and neither required them to admit to membership individuals who were refused admission for reasons unrelated to discrimination. We decline petitioners' invitation to read *Stotts* to prohibit a court from ordering any kind of race-conscious affirmative relief that might benefit nonvictims. This reading would distort the language of § 706(g), and would deprive the courts of an important means of enforcing Title VII's guarantee of equal employment opportunity."

See also *id.,* at 483, 106 S.Ct., at 3054 (Powell, J., concurring in part and concurring in judgment) ("plain language of Title VII does not clearly support a view that all remedies must be limited to benefiting victims," and "although the matter is not entirely free from doubt," the legislative history of Title VII indicates that nonvictims may be benefited), *id.,* at 490, 106 S.Ct., at 3058 (O'CONNOR, J., concurring in part and dissenting in part) ("It is now clear . . . that a majority of the Court believes that the last sentence of § 706(g) does not in all circumstances prohibit a court in a Title VII employment discrimination case from ordering relief that may confer some racial preferences with regard to employment in favor of nonvictims of discrimination"); *id.,* at 499, 106 S.Ct., at 3062 (WHITE, J., dissenting) ("I agree that § 706(g) does not bar relief for nonvictims in all circumstances").

25 In my view, an affirmative-action plan need not be supported by a predicate of racial discrimination by the employer provided that the plan "serve[s] a valid public purpose, that it was adopted with fair procedures and given a narrow breadth, that it transcends the harm to [the nonminority employees], and that it is a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Wygant,* 476 U.S., at 320, 106 S.Ct., at 1871 (STEVENS, J., dissenting). In these cases, however, the plan was undoubtedly preceded by an adequate predicate of racial discrimination; thus, I need not consider whether there is some present-day purpose that might justify a race-conscious promotion scheme.

26 Moreover, the District Court, in its opinion approving the consent decrees, found that the remedies are "reasonably commensurate with the nature and extent of the indicated discrimination," are "limited in duration, expiring as particular positions generally reflect the racial composition of the labor market in the county as a whole," allow for "substantial opportunity for employment advancement of whites and males," and "do not require the selection of blacks ... who are unqualified or who are demonstrably less qualified than their competitors." 28 FEP Cases 1834, 1838 (ND Ala.1981). Therefore, it cannot be claimed that the court failed to consider whether the remedies were tailored "to fit the nature of the violation." *Sheet Metal Workers,* 478 U.S., at 476, 106 S.Ct., at 3050. See also *id.,* at 496, 106 S.Ct., at 3060-3061 (O'CONNOR, J., concurring in part and dissenting in part).

27 Because consent decrees "have attributes both of contracts and judicial decrees," they are treated differently for different purposes. *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 236, n. 10, 95 S.Ct. 926, 934, n. 10, 43 L.Ed.2d 148 (1975). See also *Firefighters v. Cleveland,* 478 U.S., at 519, 106 S.Ct., at 3074. For example, because the content of a consent decree is generally a product of negotiations between the parties, decrees are construed for enforcement purposes as contracts. See *ITT Continental Baking Co., supra,* 420 U.S., at 238, 95 S.Ct., at 935; *Stotts v. Memphis Fire Dept.,* 679 F.2d 541, 557 (CA6 1982), rev'd on other grounds, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). For purposes of determining whether an employer can be held liable for intentional discrimination merely for complying with the terms of a consent decree, however, it is appropriate to treat the consent decree as a judicial order. Unlike the typical contract, a consent decree, such as the ones at issue here, is developed in the context of adversary litigation. Moreover, the court reviews the consent decree to determine whether it is lawful, reasonable, and equitable. In placing the judicial *imprimatur* on the decree, the court provides the parties with some assurance that the decree is legal and that they may rely on it. Most significantly, violation of a consent decree is punishable as criminal contempt. See 18 U.S.C. §§ 401, 402; Fed.Rule Crim.Proc. 42.

28 In *Walker v. Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967), we held that a party can be held in contempt of court for violating an injunction, even if the injunction was invalid under the Federal Constitution. However, in upholding the contempt citations at issue, we made clear that that was "not a case where the injunction was transparently

invalid or had only a frivolous pretense to validity." *Id*, at 315, 87 S.Ct., at 1829 Courts and commentators have relied on this reservation in positing that a contempt citation may be collaterally attacked if the underlying order was "transparently invalid." See, *e.g., In re Providence Journal Co*, 820 F.2d 1342 (CA1 1986), cert. dism'd, *sub nom. United States v Providence Journal*, 485 U.S. 693, 108 S.Ct. 1502, 99 L Ed.2d 785 (1988); 3 C. Wright, Federal Practice and Procedure § 702, p. 815, n. 17 (2d ed. 1982).

29 Both warrants and consent decrees bear the indicium of reliability that a judicial officer has reviewed the proposed act and determined that it is lawful. See *United States v Alexandria*, 614 F.2d 1358, 1361 (CA5 1980) ("trial court must satisfy itself that the consent decree is not unlawful, unreasonable, or inequitable before it can be approved"); App. to Pet. for Cert. 238a. Unlike the police officer in receipt of a facially valid warrant, however, an employer with notice of an affirmative injunction has no choice but to act. This added element of compulsion renders imposition of liability for acting pursuant to a valid consent decree all the more inequitable.

30 Section 1608.8 does not differentiate between orders "entered by consent or after contested litigation." 29 CFR § 1608 8 (1989). Indeed, the reasoning in the Court's opinion today would seem equally applicable to litigated orders and consent decrees.

The Court's unwillingness to acknowledge that the grounds for a collateral attack on a judgment are significantly narrower than the grounds available on direct review, see *ante*, at 2190, n. 6, is difficult to reconcile with the host of cases cited in *United States v. Frady*, 456 U.S., at 165, 102 S.Ct., at 1593, the cases cited in n. 6, *supra*, and those cited in the scholarly writings cited in n. 5, *supra*.

31 It is inevitable that nonminority employees or applicants will be less well off under an affirmative-action plan than without it, no matter what form it takes. For example, even when an employer simply agrees to recruit minority job applicants more actively, white applicants suffer the "nebulous" harm of facing increased competition and the diminished likelihood of eventually being hired. See Schwarzchild, Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887, 909-910.

32 In professing difficulty in understanding why respondents are not "bound" by a decree that provides a defense to employment practices that would otherwise violate Title VII, see *ante*, at 2190, n. 6, the Court uses the word "bound" in a sense that is different from that used earlier in its opinion A judgment against an employer requiring it to institute a seniority system may provide the employer with a defense to employment practices that would otherwise violate Title VII. In the sense in which the word "bound" is used in the cases cited by the Court, *ante*, at 2184 and 2185 of its opinion, only the parties to the litigation would be "bound" by the judgment. But employees who first worked for the company 180 days after the litigation ended would be "bound" by the judgment in the sense that the Court uses when it responds to my argument. The cases on which the Court relies are entirely consistent with my position. Its facile use of the word "bound" should not be allowed to conceal the obvious flaws in its analysis.

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